Supreme Court, U.S.
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No. ________ OFFICE OF THE CLERK

In The

Supreme Court of the United States

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TRI COUNTY LANDFILL ASSOCIATION, INC.,

Petitioner,

v.

BRULE COUNTY, SOUTH DAKOTA,

Respondent.

◆

On Petition For Writ Of Certiorari To The Supreme Court Of South Dakota

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

The South Dakota Supreme Court determined that an applicant for a permit reapproval had no right to Due Process under the Fourteenth Amendment. Despite Brule County selling land to the applicant and issuing it a building permit, the court found that the applicant had no "legitimate claim of entitlement" to the reapproval, and that its denial because of governmental ill will (actual malice) and oppression was not a substantive due process violation. The questions presented are:

1. Whether an applicant for a land use permit reapproval is entitled to due process?

2. In a land use action, does ill will and oppressive governmental conduct "shock the conscience" and establish a substantive due process violation?

LIST OF PARTIES

All of the parties are as stated in the caption.

CORPORATE PARTIES

Petitioner has no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Tri County Landfill Association, Inc. (Association) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Dakota.

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OPINION BELOW

The decision of the Supreme Court of South Dakota is reported at 2002 SD 32 (2002); it appears at Appendix A. The decisions of the Fourth Circuit of South Dakota (Brule County) are not reported; they appear at Appendix B and C. Page references are to the version in the Appendix.

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JURISDICTION

The Supreme Court of South Dakota's opinion was filed and entered on March 6, 2002. A1. A petition for rehearing was denied on April 16, 2002. F1. The petition for writ of certiorari was timely filed under this Court's Rule 13.1. Jurisdiction over this matter is pursuant to 28 U.S.C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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STATEMENT OF THE CASE

This is an abusive zoning case. It is not about an initial permit denial or about a mere allegation of governmental malice. It is about Brule County (County) admitting it had ill will toward several Association officials. App. G. It is also about the County approving a land use several times and then opposing it without any evidence to show it was unsafe or that it violated its land use ordinances. App. E12. This is despite the County having sold land for a specific use to an association of counties and municipalities; despite the Association spending hundreds of thousands of dollars developing it in reliance upon the County's approvals; and despite that it was needed to meet State and Federal environmental requirements. App. E. As a result of the County's denial, the Association suffered extensive damages. App. A ¶ 5.

Although the County's prior approvals had not expired under its land use ordinance, the Association sought County reapproval as a condition to obtain a state landfill permit. App. A ¶ 3; E7; R. 942. When the matter came before the Brule County Commission, commissioners, who admittedly had ill will toward several Association's officers, cast the deciding votes and rejected the reapproval on a 3 to 2 vote. App. E14; G.

The Association challenged this deprivation of land use by filing two actions in state court. The first action was an appeal from the County's decision. The second action included a due process challenge pursuant to 42 U.S.C. § 1983. In the first action the trial court found that the decision was arbitrary, capricious, oppressive, and that the County had ill will toward the Association's manager. App. D; E14. The court below affirmed. App. D. In the second action the trial court adopted the findings and conclusion from the first action and awarded damages and attorney fees. App. A ¶ 5. The court below reversed. First, it held that the Association must establish a clear entitlement to the reapproval. Second, it held that the "conduct" employed in a land use permit denial must be shown to be truly irrational or sufficiently outrageous. App. A ¶¶ 6, 10. Upon remand, the trial court made adverse rulings to the Association, which were affirmed by the court below. App. A ¶ 7.

A. In 1993 the County Issues Permits to the Association to Build a Landfill on Land It Bought from the County.

Various counties and municipalities formed a non-profit association in order to comply with the new Federal and State environmental rules. App. D2, 3. In 1993 the Association bought land from the County only after a public hearing approving a special exception allowing a landfill to be built. App. E6. The County also issued it a certificate of zoning compliance and a building permit. *Id.* These approvals could be revoked only after notice by the Zoning Administrator. R. 941-2.

The 40-acre site was part of the old dump owned by the County and had been designated for a regional landfill in the County's comprehensive plan. App. E5. To its south was a large feedlot. App. E4. To its north was a farm containing over 50 junked vehicles. *Id.*

In relying upon the County's approvals, the Association applied for a state permit, constructed numerous ground water monitoring wells, and made significant expenditures for engineering and other technical services. App. D12; E7.

B. In 1994 the Association Requests Reapproval – Which Was Rejected by Commissioners Who Had Ill Will.

Three of the County's five commissioners eventually opposed the landfill by filing an objection to the Association's request for a State landfill permit. App. E11,12. As a result of the objection, the State determined that the proposed landfill met all of its regulations but postponed permit issuance until the Association obtained county reapproval, which the County denied on a 3 to 2 vote. App. A ¶¶ 3, 4. No reason was given for the County denial. App. E12.

The County admitted that the commissioners who voted against the reapproval were the same ones who earlier had voted to sell the County's land for a landfill and had given the Association zoning approval. App. H. Despite this admission, the court below erroneously believed that these commissioners had been elected after the landfill's initial permit approval, and the landfill had been an election issue. App. A ¶¶ 4, 17.

C. After a Permitting Trial, the Court Finds the County Had Acted Oppressively and With Ill Will, Which Was Affirmed by the Court Below.

After the County rejected the landfill, the Association filed two actions in state court against the County. The first action was an appeal from the rejection, and the second action requested damages under 42 U.S.C. § 1983 alleging violations of the Fourteenth Amendment's Due Process Clause. App. A ¶¶ 4, 5. The trial court ordered the landfill to be reapproved and found that the County acted arbitrarily, capriciously, oppressively, and had ill will toward McManus, the Association's manager. App. E14. The County appealed to the court below. App. A ¶ 4. It held that the County's appeal was frivolous and affirmed:

> The evidence . . . demonstrated that the newly-developed opposition to Association's proposed facility was not based on any legitimate concerns over the design or operation of the facility. Indeed, the state agency in charge of permitting and regulation of solid waste facilities had given its approval as the proposed facility met all legal requirements and furthered the legislative policy of promoting regional waste disposal alternatives.

App. D13.

D. At the Damages Trial, the Court Finds the County Had Violated the Association's Due Process Rights and Awards Damages. The Court Below Reverses the Decision.

In the second action the trial court concluded that the County had violated the Association's Due Process rights.

App. A ¶ 5. The trial court adopted the decision from the first action, and awarded damages and attorney fees of $628,428.03. *Id.* The County appealed. The South Dakota Supreme Court reversed and remanded for findings of whether the Association had a protected property right and whether the County had acted truly irrationally. App. A ¶ 6.

E. On Remand the Trial Court Finds No Protected Property Right And No Truly Irrational Conduct, Which Is Affirmed by the Court Below.

On remand the trial court ruled that the Association did not have a protected property right, because the County had approval discretion – despite the County having sold the land and approving its use as a landfill. App. A ¶¶ 2, 7. The trial court also characterized the County Commissioners' ill will as unsubstantiated – despite the County's admission it existed – and further concluded that ill will could not establish a substantive due process violation. App. A ¶¶ 22, 23; G. However, the trial court later denied costs to the County after the Association claimed they were being requested in bad faith. App. C. The trial court also ruled that while the County was not "truly irrational," it was "clearly arbitrary and capricious" when it refused to reapprove the landfill. App. C4, 5. The court below affirmed the trial court on a 4 to 1 vote. App. A.

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SUMMARY OF ARGUMENT

There is a serious conflict between the court below and among the lower courts whether the protections afforded by the Due Process Clause attach to landowners seeking permit renewals to make reasonable use of their property. This conflict stems in large part from a misapplication of this Court's holdings in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). In addition, there is a serious conflict among the lower courts whether governmental oppression and ill will "shocks the conscience" and establishes a substantive due process violation.

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REASONS FOR GRANTING THE WRIT

On two important questions of substantive due process law, the court below issued decisions that are in conflict with the decisions of other lower courts, both state and federal. All of those conflicts warrant resolution by this Court.

The initial question before this Court is whether an applicant for a permit reapproval is entitled to due process. This is an issue that has confounded the courts of the land. In some of these jurisdictions, such as the court below, the courts treat the land use permitting process as a mechanism to create a governmental entitlement or benefit and hold that one has no property interest in a permit renewal and consequently no right to due process.

The court below, as well as other courts in the Nation, have compounded their mistake of treating land use permits as a discretionary benefit by ignoring state property laws as well as a principle of *Sindermann* that a property interest, "may be implied from words or conduct." *Sindermann*, 408 U.S. at 601-3. These courts don't grasp that *Roth* and *Sindermann* extended the application of due process standards to certain governmental entitlements – *not reduced* the existing right to make reasonable use of real property.

Landowners who seek a substantive due process remedy for injury resulting from an egregious decision face an almost insurmountable barrier in those courts that have erected the entitlement threshold test in order to avoid becoming "zoning boards of appeal." However, other courts such as the Third Circuit have clearly rejected the notion that ownership of property is insufficient to invoke substantive due process protection from egregious governmental action. Indeed, this Court has reviewed on numerous occasions alleged deprivations of due process in the context of land use regulation, and has implicitly accepted the understanding that due process attaches to the land use permitting process.

Certiorari is also needed to resolve a conflict among the Circuits and other courts as to what type of conduct "shocks the conscience" in a permit renewal case. Some lower courts hold that a due process violation is established by the shocking conduct that is necessary for a punitive damage award, e.g., oppression or malice. These courts conform to the tenet of *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) that behavior at the end of the culpability spectrum in customary tort liability "would most probably support a substantive due process claim." The court below and other courts, however, find that this type of conduct, especially malice, is not sufficiently shocking to establish a due process violation.

This conflict among the lower courts and conflict with the practices of this Court sows confusion and disparate treatment of landowners. These are questions upon which this Court must grant review in order to resolve the conflict and in order to ensure fair treatment of property owners in proceedings that limit the use or development of their property. *See* Supreme Court Rules 10(b) and 10(c).

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ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A SERIOUS CONFLICT AMONG THE CIRCUITS AND THE STATES

> The power of local governments to zone and control land use is undoubtedly broad. . . . But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." Accordingly, it is subject to judicial review; and as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 67 (1981) (citations omitted).

The sharp conflict among the lower courts over what property interest is protected by the Fourteenth Amendment's Due Process Clause in land use cases is both pervasive and long-standing. On one side of the conflict are the Third Circuit and the Supreme Court of Delaware that find a protected property interest in land ownership. See *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), *cert. denied*, 516 U.S. 937 (1995) and *Dale v. Town of Elsmere*, 702 A.2d 1219 (Del. 1997).

In *DeBlasio* the Third Circuit had to consider the due process claims of a landowner who sought a variance for a nonconforming use. In that case, the court implicitly assumed the plaintiff had a protected property interest and found "one would be hard-pressed to find a property interest more worthy of substantive due process protection than [land] ownership." *DeBlasio*, 53 F.3d at 601.

Contrary to the thoughtful reasoning of the *DeBlasio* court, the South Dakota court adopted the notion that ownership of private property does not involve a property interest protectible by the Due Process Clause. This decision cannot be shrugged off as an anomaly, as several Circuit Courts of Appeals have also rejected the basic idea that ownership of property entails use and enjoyment of that property.

This question should have been settled long ago. In 1829, speaking through Justice Story, this Court held that the American Revolution settled it: for it would be repugnant to our government's very nature when "the rights of property are left solely dependent upon the will of a legislative body without restraint." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). The *Wilkinson* Court declared, "[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred," *id.*, and stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson*, 27 U.S. (2 Pet.) at 657-58.

The passage of years has not undermined recognition of the fundamental basis of property ownership in the American political system. For example, in discussing the importance of procedural due process to reduce the likelihood of substantively unfair treatment of property owners, this Court explained, "the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

One would think it obvious that fundamental to the ownership of property is the use and enjoyment of that property, and that restrictions on such use would definitely implicate the Due Process Clause. Instead, the South Dakota court adopted the entitlement test of *Roth*, and disregarded the Association's property interest – which was purchased from the County – and its prior decisions involving the vesting of property rights. The court assumed that the landfill reapproval the Association sought was just another discretionary governmental benefit and not a "clear entitlement." App. A ¶ 16. However, this does not accord with this Court's finding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). "But the right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.'" *Nollan*, 483 U.S. at 833 n.2. One of the defining characteristics of property ownership is that owners get to use their land. The permit process does not confer any benefits or rights upon the successful applicants. To the contrary, this process restricts existing rights to ensure that uses of property do not impair the rights of others. It is a process that protects rights, rather than confers them.

Nevertheless, several circuits stand with South Dakota on the other side of the conflict. These include the Second, Fourth, and Ninth Circuits. See, *RRI Realty Corp. v. The Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir. 1989); *Sylvia Development Corp. v. Calvert Co., Maryland*, 48 F.3d 810 (4th Cir. 1995); and *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988).

RRI Realty, for example, involved a substantive due process challenge to a denial of a building permit. In that case, the Second Circuit traced the development of property interests for both procedural and substantive due process purposes and concluded the Supreme Court has always assumed a protected property interest in land ownership but that the circuit was compelled by its own precedent to apply the *Roth* "entitlement" test. *Id.* at 917-18.

These "entitlement" courts have made a policy decision to misapply *Roth* and *Sindermann* in order to deny review of federal constitutional issues in land use permitting disputes – no matter how egregious the governmental conduct is alleged to be. But this policy decision should not apply to the denial of permit renewals – especially when a state court has already interpreted its land use laws to reach a decision that the government acted maliciously or oppressively.

The Second Circuit's approach ignores this Court's admonition in *Schad*, quoted at the beginning of this section, that the standard of review in constitutional challenges to land use regulation should be "determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." The Second Circuit's entitlement test is so rigorous that it invariably results in courts focusing exclusively on the power (degree of discretion) being exercised as a matter of law, and eliminates the need for courts to consider the nature of the right (substantive due process). Brian W. Blaessner, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 Washington University Journal of Law and Policy 583, 594 (2000).

The conflict between the Third Circuit and the Supreme Court of Delaware on the one hand and the Second, Fourth, and Ninth Circuits and the South Dakota court on the other is the very type of conflict that demands resolution by this Court. It causes confusion and results in contradictory enforcement of the law. Many businesses and individuals own property in numerous jurisdictions. These property owners should not be subject to uncertain or inconsistent application of federal law in permit renewals. And while this behavior may be typical in some third world countries, it would have been intolerable to our founding fathers. For these reasons, this Court should grant the writ of certiorari.

II

WHETHER LANDOWNERS SEEKING PERMIT RENEWALS HAVE A DUE PROCESS RIGHT IS AN IMPORTANT QUESTION OF LAW SUBJECT TO REPETITION NATIONWIDE

As with any other real property owner, the Association has a constitutional right to the reasonable use of its property. "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917). However, in reliance on this Court's "entitlement" test in *Roth*, the lower court characterized the landfill reapproval as a discretionary governmental benefit in which the Association had no "clear entitlement" and, therefore, no protected property interest. App. A ¶ 16. But, the "entitlement" test is inapplicable in an action such as this. The relevant property interest was not in the reapproval sought by the Association but in the land it owned – which was bargained for and purchased from the County only after it approved the property's use as a landfill. App. F14. The Court's decision in *Sindermann* supports this conclusion and undercuts the ruling below.

Roth merely was a "new property" case that held a "legitimate claim of entitlement" to a "benefit," in that case a nontenured teaching position, was needed to trigger certain procedural protections. *Roth*, 408 U.S. at 577. Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 Washington University Journal of Law and Policy 61 (2000). *Roth* was broadening the class of claims that come under Due Process protection, not contracting them. Unlike a professor seeking continued employment, property owners are not claiming the right to a government-established benefit when they seek to make use of their property. *Nollan*, 483 U.S. at 833 n.2 ("the right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit' "). One of the defining characteristics of property ownership is that the owners get to use their land.

Roth and *Sindermann* did not, however, redefine property interests protected by the Fourteenth Amendment that *do not* derive from a governmental benefit. As to such interests, this Court made only a passing, but significant, reference. "The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, at 571-72. In this language, this Court recognizes an already established protected property interest in "actual ownership of real estate." This is one of the interests to which the Association lays claim.

The significance of *Roth*, and its recurring misapplication, is aptly explained in the Second Circuit case of *RRI Realty*. As the Second Circuit explained, the initial effort to subject local land use decisions to constitutional scrutiny involved challenges to new zoning restrictions imposed upon property owners. *Id.* at 914. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning regulation upheld). However:

> [I]n the early zoning cases, there was no dispute as to whether the plaintiff had a property interest within the meaning of the Fourteenth Amendment; his property interest was in the

> land he owned, land that the local regulating body sought to restrict as to use.

RRI Realty, 870 F.2d at 915.

Nevertheless, after 1972, some courts when considering constitutional challenges to land use regulation began citing *Roth* and *Sindermann* and asking whether the applicant had a "clear entitlement" to the approval sought from the land use regulating body. *Id.* The Second Circuit observed that it is not readily apparent why this happened – "instead of simply recognizing the owner's indisputable property interest in the land he owns." *Id.* at 917. In any event, the misapplication of *Roth* and *Sindermann* began, and over time it became more extreme.

Initially, some courts applied *Roth* and *Sindermann* correctly to find a protected property interest in a permit renewal, but this was short lived. For example, the Michigan Supreme Court decided that despite its contrary rulings made prior to *Roth* and *Sindermann*, an applicant now had a protected property interest in the permit renewal. *Bundo v. City of Walled Lake*, 395 Mich. 679 (1976). See also *Celebrity Club Inc. v. Utah Liquor Control Comm.*, 657 P.2d 1293 (1982). Significantly, and in a case similar to the present one, the First Circuit found that a permit applicant – after receiving one permit approval – had a sufficient interest to entitle it to procedural due process during another permit application. *Sucesion Suarez v. Gelabert*, 701 F.2d 231, 233 (1st Cir. 1983).

Later courts, however, began to require a certainty or "a very strong likelihood that the application would have been granted" in order to bestow protected property status. *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986). Now these courts have dropped the ability to establish a protected property interest by a strong likelihood and instead require certainty – an absence of governmental discretion. *RRI Realty*, 870 F.2d at 918.

With the South Dakota Supreme Court's decision, a new low mark has been set. Now one doesn't have a protected property right to complete a project – despite the government selling the land for the express purpose of developing it – if the government has discretion to issue permits. The South Dakota holding allows a county's discretion to trump over estoppel and fairness. This draconian result runs counter to *Sindermann* and the court below's prior property rulings.

The South Dakota Supreme Court chose to follow a Second Circuit decision and ignore its own case law in order to reach this result. App. D8; A ¶ 16. Previously it held if "the applicant for the permit plans to comply with the ordinances . . . he is entitled to the permit." *City of Mobridge v. Brown*, 164 N.W. 94, 95 (S.D. 1917). The Eighth Circuit recognized this legal principle when it ruled that SDDS had a property right to build a landfill in South Dakota, because the determination that all of the factual predicates and legal requirements for SDDS's *unissued* permit had been met. *In re SDDS, Inc.*, 97 F.3d 1030, 1039 (8th Cir. 1996). Since the Association had undisputedly complied with all of the *County's* land use laws, it follows that the Association also had a property right to build a landfill. App. E16; R. 1044-5, 1033 p. 67.

Likewise, the South Dakota Supreme Court ignored the *Sindermann* principle that, "property interests . . . are not limited by a few rigid, technical forms. . . . Thus, reasonable expectations in a particular status may attain protected property status based upon . . . a mutually explicit understanding a governmental body puts forth, and such an interest may be implied from words or conduct." *Sindermann*, 408 U.S. at 601-3.

This Court held in *Sindermann* that fairness and estoppel were factors for determining a property status or vested right. *Id.* This was not a foreign concept to the court below because it previously used estoppel to rule that a landowner had a vested right to complete a land use project – despite his failure to comply with the ordinance. The court below held that a government may not create an "impression in an applicant that he has fully complied with all zoning requirements and then proceed to withdraw permission after the applicant has taken steps toward construction that result in a substantial detriment to the applicant." *Even v. City of Parker*, 1999 SD 72 at ¶ 14.

Moreover, the County in all fairness cannot dispute that the landfill should have been reapproved. The first trial court said:

> [S]everal counties relied on the actions of the county commission and the TCL landfill in determining how they were going to handle their solid waste. Counties spent money, the record shows. Winner spent $250,000 on a transfer station, the TCL landfill has expended over $200,000 on this particular project and on this particular site and to stop it without any sound basis is not appropriate. R. 994.

The Sixth Circuit has not resorted to such drastic curtailment of property rights as the court below did. It clearly rejected this type of unfair result and used estoppel to find a property status – just as this Court intended in *Sindermann*. See *Buckeye Community Hope v. City of*

Cuyahoga Falls, 263 F.3d 627, 643 (6th Cir. 2001), where the court in quoting from another case, said that the landowner's, "property interest was securely vested by [his] engagement in substantial acts taken in reliance, to his detriment, on representations from and affirmative actions by the City."

If *Sindermann* is to have any effect, the County by selling the land to the Association for a landfill created a protected property right. Certainly, a "mutually explicit understanding" occurred when the County issued a deed to the Association the same day it approved the special exception to build a landfill. App. E6. Significantly, this "understanding" was cemented when the County adopted a resolution approving the sale and the building of the landfill. App. E5.

With this petition this Court has an opportunity to clarify a trend that has disturbed at least one member of this Court:

> [T]he Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property.

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (Thomas, J., concurring and dissenting).

The right to make reasonable use of real property is a fundamental attribute of this Nation's character. It is a core principle of our Constitution and one that has made this Nation unique – both in terms of our economic lives and in our ability to maintain individual autonomy. As this Court has aptly noted, our liberty is inseparable from our rights in property. *Lynch v. Household Finance*, 405 U.S.

538, 552 (1972). And while it is perfectly appropriate that the right to use property be subject to reasonable governmental regulation and restrictions in furtherance of public health, safety, and general welfare, such restrictions must be imposed with some modicum of fairness and due process. But the court below holds that due process applies only if a permitting body has no discretion to reapprove a permit – which rarely occurs under the neutered permitting statutes and ordinances that generally exist today. *Blaessner*, *supra* at 586. Other courts are not nearly so parsimonious. Only this Court can reaffirm the constitutional protections that the Fourteenth Amendment affords landowners nationwide, and only this Court can clarify the meaning of this Court's *Sindermann* and *Roth* decisions. To resolve this question, this Court should grant the petition for writ of certiorari.

III

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT OF WHETHER THE "SHOCKS THE CONSCIENCE" STANDARD IS MET BY OPPRESSIVE OR MALICIOUS GOVERNMENTAL CONDUCT

In a land use action, does ill will or oppressive governmental conduct "shock the conscience" and establish a substantive due process violation? There is a division among the circuits and states in the answer to this question. The court below found that ill will, which is actual malice, is not truly irrational conduct, i.e., is not egregious or shocking conduct. App. A ¶ 22.

In 1998 this Court held that shocking behavior establishes a substantive due process violation. *County of*

Sacramento at 523 U.S. 848-9. The common law and state legislatures have also established that shocking (outrageous) conduct can be punished by punitive damages. *Smith v. Wade*, 461 U.S. 30, 49 (1983). This outrageous conduct is generally considered to include oppression and malice. *Id.*, 461 U.S. at 75 (Rehnquist, J. dissenting). See also SDCL 21-3-2.

Certainly, governmental oppression establishes a due process violation. *County of Sacramento* at 523 U.S. 840. The first trial court specifically found that the County acted oppressively. App. E17. Inexplicably, the second trial court and court below never addressed this issue despite it having been raised. R. 694.

Courts are split on whether malicious governmental conduct establishes a substantive due process claim. Although this Court has not specifically ruled that malice establishes one, it said that behavior at the end of the culpability spectrum in customary tort liability "would most probably support a substantive due process claim." *County of Sacramento* at 523 U.S. 849. This Court also held that a plaintiff did not have a substantive due process claim when there was no evidence of an "improper or malicious motive;" thus implying that if evidence had been present, the result would be different. *Id.* at 523 U.S. 855.

When a government acts with malice, especially the actual form of malice (ill will), it should shock the average citizen's sense of fair play. *Smith v. Wade*, 461 U.S. at 37, n.6. Surely, governmental malice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Because the County clearly admitted it had ill will – which the court below overlooked – a substantive due process violation should have been established. App. G.

Recently, Justice Breyer acknowledged that vindictive action, illegitimate animus, or ill will is sufficient to make an ordinary zoning dispute a constitutional violation. *Olech v. Village of Willowbrook*, 528 U.S. 562 at 566 (Breyer, J., concurring). (2000). Despite this and other authority, the court below held that ill will could never establish one. App. A ¶ 22.

At least three Federal Circuit Courts of Appeals and four state courts have ruled that when a government acts maliciously or is motivated by any consideration other than the public welfare, a substantive due process violation is established. *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988); *Walz v. Town of Smithtown*, 46 F.3d 162 (2nd Cir. 1995); *Blanche Road Corp. v. Bensalem Tp.*, 57 F.3d 253, 263 (3rd Cir. 1995); *Harvey v. Town of Waitsfield*, 137 Vt. 80 (1979); *Hutchinson v. City of Huntington*, 198 W.Va. 139, 156 (1996); *L. A. Ray Realty v. Town of Cumberlain*, 698 A.2d 202, 212 (R.I. 1997); *Eternalist Foundation, Inc. v. City of Platteville*, 225 Wis.2d 759, 780 (Ct.App. 1999), *review denied*, 228 Wis.2d 174 (1999).

South Dakota, on the other hand, joins the First Circuit and the New Jersey Supreme Court in determining that malice is irrelevant in establishing a substantive due process violation. See *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990); and *Rivkin v. Dover Township Rent Leveling Board*, 143 N.J. 352, 371 (1996). Also, compare *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068 (8th Cir. 1997), where a decisionmaker "disliking" the applicant does not establish one, with *Yerardi's Moody St. Restaurant v. Bd. of Selectmen*, 923 F.2d 89 (1st Cir. 1991), where if malice is harbored by the government toward a permit applicant, an equal protection claim is established.

The opinion below exacerbates this conflict on an important issue of constitutional law – the fundamental right of individuals to be free from arbitrary governmental conduct in the use of their private property. Recognizing the existence of claims such as the Association's is important. There are instances when government officials seek to "get back" at a person or to retaliate for reasons that are reprehensible, illegitimate, and not related to the person's exercise of a protected right. In short, vindictive action, illegitimate animus, or ill will should be sufficient to make an ordinary zoning dispute a constitutional violation. *Olech v. Village of Willowbrook*, *supra*. This Court should settle these conflicts and decide if due process requires governments not to act maliciously or oppressively when deciding to curtail the property rights of their citizens.

CONCLUSION

In order to ensure that property rights are not treated as a "poor relation" of the rest of the rights guaranteed in the Bill of Rights, property owners' claims based on due process protections against malicious and oppressive governmental actions must be given meaningful review by the courts. The federal and state courts must understand that reasonable use of one's property is a constitutional right. It is not a privilege to be meted out by an arbitrary government.

For the reasons stated above, this petition for writ of certiorari should be GRANTED.

DATED: July, 2002.

Respectfully submitted,

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APPENDIX A

South Dakota Supreme Court
Tri County Landfill Association, Inc. vs Brule County, 2002 SD 32
Opinion Filed On Wednesday, March 06, 2002

Tri County Landfill Association, Inc.
Plaintiff and Appellant
v.
Brule County
Defendant and Appellee

[2002 SD 32]

South Dakota Supreme Court
Appeal from the Circuit Court of
The First Judicial Circuit
Brule County, South Dakota
Hon. Jon R. Erickson, Judge

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Argued January 10, 2002
Opinion Filed 3/6/2002

#22012, #22019

GILBERTSON, Chief Justice

[1.] Brule County (County) sold Tri County Landfill Association, Inc. (Landfill), 40 acres of land to develop a regional solid waste facility. Landfill received tentative approval from the Department of Environment and Natural Resources (DENR), but the Board of Minerals and Environment (BME) denied the permit pending a resolution by County re-approving the landfill. County refused and Landfill sued for damages under 42 USC § 1983. Landfill now appeals the trial court's granting of summary judgment upon a determination that, while County's denial of the permit was arbitrary and capricious, it was not "truly irrational" and was therefore insufficient to sustain a substantive due process claim. We affirm.

FACTS AND PROCEDURE

[2.] Landfill was formed in 1992 as a non-profit corporation to develop, construct, and maintain a regional solid waste facility in Brule County, South Dakota. Landfill members are county and municipal governmental bodies exercising joint power agreements, and Landfill's voting delegates are officials of the member counties and cities. County became a member of Landfill in 1992 and subsequently sold forty acres to Landfill for development of the solid waste facility. On April 27, 1993, County's zoning board granted Landfill a special exception necessary to construct the solid waste facility on the property. Landfill then filed a permit application with DENR, which was tentatively approved on July 29, 1993.

[3.] On August 26, 1993, Clifford Lantz (Lantz), an adjoining landowner and resident of County, filed a contested case petition and a request for a hearing.[1] The hearing was held on January 19, 1994, and BME announced its conclusion a month later. BME determined that Landfill had complied with South Dakota's regulations, but it had failed to obtain County's approval within six months prior to BME's approval, as required by SDCL 34A-6-103.[2] Therefore, issuance of Landfill's permit was postponed pending re-approval by County.

[4.] A change in the County Commission's membership resulted in a denial of Landfill's request. Landfill was unable to garner the majority vote necessary to gain approval. Landfill appealed this denial to the circuit court, which determined County's actions to be "arbitrary and capricious." On appeal to this Court in *Tri County I*,[3] we affirmed the circuit court's decision and ordered County to reissue the permit approval to Landfill. The facility eventually opened on November 4, 1996.

[5.] On June 20, 1994, Landfill sued County under 42 USC § 1983 for a violation of substantive due process. County moved to dismiss and, in the alternative, moved for summary judgment. Landfill moved for partial summary judgment on the issue of liability. The trial court granted Landfill's motion and the trial went forward on the issue of damages. Landfill was awarded $628,428.03 in damages, prejudgment interest, attorney's fees and costs.

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[1] Prior to the hearing, County withdrew its membership in Landfill.

[2] SDCL 34A-6-103 has since been amended to require county approval within twenty-four months of BME's approval, rather than six months. *See* 1996 SDSessL ch 220 § 1.

[3] Tri County Landfill Ass'n, Inc. v. Brule County, 535 NW2d 760 (SD 1995).

[6.] On appeal to this Court in *Tri County II*,[4] we reversed the trial court's determination that County's "arbitrary and capricious" violation of state law automatically amounted to a violation of substantive due process. We remanded the action for a factual determination of whether County's conduct was "truly irrational" in order to sustain Landfill's § 1983 claim and whether Landfill had a protected property interest in the approved permit.

[7.] On remand, the trial court determined that County was exercising a discretionary function under SDCL 34A-6-103, which eliminated any protected property interest. The court also determined that, in drawing all inferences in favor of Landfill, County's conduct was not truly irrational because there was sufficient evidence to indicate "a conceivable rational relationship between the denial of the permit and a legitimate governmental interest." Finally, the court denied County's application for costs under SDCL 15-17-37.

[8.] Landfill now appeals, asking that that the trial court's summary judgment in favor of County be reversed and instead, granted in favor of Landfill. In oral argument, Landfill conceded that no genuine issue of material fact remained and that the only remaining issues were legal conclusions to be drawn from uncontested facts. Therefore, Landfill raises the following issues:

---

[4] Tri County Landfill Ass'n, Inc. v. Brule County, 2000 SD 148, 619 NW2d 663.

> 1. Whether Landfill possesses a protected property interest in the approved permit.
>
> 2. Whether County's conduct, in denying re-approval of the solid waste facility, was "truly irrational" and in violation of substantive due process.

County, through notice of review, presents only one issue for appeal:

> 1. Whether the trial court abused its discretion in denying County's claim for costs and disbursements in the amount of $14,771.26.

STANDARD OF REVIEW

[9.] Our standard of review for summary judgment is well settled.

> Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

Holzer v. Dakota Speedway, Inc., 2000 SD 65, ¶8, 610 NW2d 787, 792 (quoting SDCL 15-6-56(c)) (additional citations omitted). As neither party now argues that questions of fact remain, a prevailing party must show the facts entitle it to summary judgment as a matter of law.

ANALYSIS AND DECISION

[10.] Landfill seeks relief under 42 USC § 1983 for due process violations. "The due process clause of the Fourteenth Amendment prohibits state governments from depriving 'any person of life, liberty or property, without due process of the law. . . . '" Young v. City of St. Charles, Mo., 244 F3d 623, 627 (8thCir 2001) (quoting USConst amend XIV, § 1). This protection may be split into its two counterparts, procedural due process and substantive due process. *Id.* A violation of substantive due process occurs when "certain types of governmental acts [violate] the Due Process Clause regardless of the procedures used to implement them." *Tri County II*, 2000 SD 148 at ¶14, 619 NW2d at 668 (citations omitted). Landfill alleges that County's refusal to re-approve the placement of the solid waste facility in County, while Landfill remained in compliance with the appropriate state regulations, was a violation of Landfill's right to substantive due process.

[11.] In order to maintain a cause of action under 42 USC § 1983, the plaintiff must show: (1) that the defendant acted under color of state law; and (2) that the defendant deprived the plaintiff of a constitutionally protected property right or interest. *See* Bd. of Regents of State Colleges v. Roth, 408 US 564, 577, 92 SCt 2701, 2708, 33 LEd2d 548, 561 (1972); Bituminous Materials, Inc. v. Rice County, Minn., 126 F3d 1068, 1070 (8thCir 1997); *Tri County II*, 2000 SD 148 at ¶10, 619 NW2d at 667 (citations omitted). In the context of a zoning or land-use dispute, the plaintiff must go one step further to show that the "government action was 'sufficiently outrageous' or 'truly irrational, that is, something more than . . . arbitrary, capricious, or in violation of state law.'" *Young*, 244 F3d at 628 (quoting Anderson v. Douglas County, 4 F3d 574, 577 (8thCir 1993)) (additional citations omitted). Because the parties do not dispute that County acted under color of state law, our focus is upon determining the presence or absence of a protected property interest and truly irrational conduct, given the uncontested facts.

[12.] 1. Whether Landfill possesses a protected property interest in the approved permit.

[13.] Analysis of a substantive due process claim "must begin with an examination of the interest allegedly violated." *Young*, 244 F3d at 627 (citing *Dover Elevator Co. v. Ark. State Univ.*, 64 F3d 442, 444-46 (8thCir 1995)). *See also SDDS, Inc. v. State of SD*, 994 F2d 486, 491 (8thCir 1993) (recognizing determination of plaintiff's protected property rights is threshold issue). In *Tri County II*, this Court stated that, in order to demonstrate it held a protected property interest, Landfill must show that County did not have the discretion to deny its permission, despite Landfill's failure to meet the six-month deadline requirement. 2000 SD 148 at ¶29, 619 NW2d at 674. In other words, Landfill must demonstrate that it had a clear entitlement to the permit. *Id.*

[14.] Landfill claims that so long as it remained in compliance with South Dakota regulations, County could not withhold its approval. Yet, Landfill overlooks one regulation that it was not in compliance with – the deadline provision of SDCL 34A-6-103. Projects inevitably change over time, as was evidenced by the record in this case. The Legislature intentionally built in this deadline requirement to ensure that the project presented to BME not only remained in compliance with South Dakota safety and health standards, but that it also remained consistent with the concept originally approved by the county.

[15.] County relies on SDCL 34A-6-103 to establish its discretion to deny re-approval of the project and thereby negate any protected property interest in the permit. SDCL 34A-6-103 provides:

> Any application to the Board of Minerals and Environment for a permit for a facility for the transportation, storage or disposal of solid waste or medical waste pursuant to this chapter shall include a resolution by the governing body of the county in which the facility is to be located approving the proposed facility. *Approval by the county within no more than six months before the issuance of the permit by the Board of Minerals and Environment shall be considered as a condition for the issuance of the permit.*

(emphasis added). The plain language of the statute clearly indicates that any prior approval lapses after the passage of six months. Accordingly, the applicant would be expected to again seek county approval before receiving the permit from BME.

[16.] It follows then, that because County had the discretion to approve or disapprove the project under SDCL 34A-6-103, even after prior approval had been given, Landfill had no clear entitlement to, or protected property interest in the permit. "The fact that the permit could have been denied on non-arbitrary grounds defeats the federal due process claim." RRI Realty v. Inc. Village of South Hampton, 870 F2d 911, 918 (2ndCir 1989). *See also Bituminous Materials*, 126 F3d at 1070 (stating "holder of a land use permit has a property interest if a state law or regulation limits the issuing authority's discretion to restrict or revoke the permit by *requiring* that the permit issue upon compliance with terms and conditions prescribed by statute or ordinance.") (emphasis in original); Villager Pond, Inc. v. Town of Darien, 56 F3d 375 (2ndCir 1995) (stating "a constitutionally protected property interest exists only when `the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.'"). While County's denial of the permit may have been legally unjustified (i.e., arbitrary and capricious), that is not the standard. The question is whether County had the discretion at all, and not whether that discretion was arbitrarily exercised. Upon remand, Landfill failed to demonstrate such a limitation on County's power that approval was guaranteed.[5]

[17.] Landfill also asserts that because County had previously approved the permit, any discretion provided in SDCL 34A-6-103 was eliminated and County should be bound by the previous commission's decision. But, "prior approval from the current County's predecessor does not bind the County to automatically approve Landfill's proposal." *Tri County II*, 2000 SD 148 at ¶28, 619 NW2d at 674. Landfill does not dispute that the composition of the County Commission was legally changed through the political process. A different decision hardly seems unreasonable or unexpected, given the significant public opposition raised and the inherently political nature of the permitting process.

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[5] Landfill raised the issue of whether SDCL 34A-6-103 is unconstitutional in *Tri County II*, 2000 SD 148 at ¶8, 619 NW2d at 666. Landfill alleged that the statute is unconstitutional in that it affords too much discretion to County in approving or denying permits because it contains no specific guidelines. We considered this issue in *Tri County II* and found it to be without merit. *Id.* at ¶38.

[18.] **2. Whether County's conduct, in denying re-approval of the solid waste facility, was "truly irrational" and in violation of substantive due process.**

[19.] In *Tri County II*, this Court held that County's denial of re-approval, though arbitrary and capricious, was not automatically a violation of substantive due process. 2000 SD 148 at ¶43, 619 NW2d at 676. In order to sustain a substantive due process claim based upon a zoning or land-use dispute, the challenger must show that the agency's conduct was "truly irrational." *Id.* Thus, even if Landfill could establish a protected property interest in the permit, Landfill is still required to show that County's denial of re-approval was truly irrational.

[20.] While "truly irrational" conduct has not been defined by this Court, the Eighth Circuit has addressed the issue at length. For example, in Chesterfield Development Corporation v. City of Chesterfield, the court described an example of truly irrational conduct as "attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet." 963 F2d 1102, 1103-04 (8thCir 1992) (denying substantive due process claim of developer who claimed he was deprived of property by city's enforcement of invalid zoning law). In Lemke v. Cass County, Nebraska, one judge described truly irrational conduct as "a zoning board's decision made by flipping a coin." 846 F2d 469, 472 (8thCir 1987) (Arnold, J., concurring) (holding denial of rezoning application for solid waste facility, after county commissioners had previously approved the project, was not truly irrational). The court has also stated what is *not* truly irrational conduct. In WMX Technologies, Inc. v. Gasconade County, Missouri, the court held that passing a solid waste management ordinance in violation of state law, without legitimate scientific evidence and in response solely to public opposition, was not truly irrational. 105 F3d 1195 (8thCir 1997). *See also* L.C. Dev. Co., Inc. v. Lincoln County, 996 FSupp 886 (EDMo 1998) (holding landfill regulation passed in violation of state law not truly irrational); Crooked Lake Dev., Inc. v. Emmet County, 763 FSupp 1398 (WDMich 1991) (holding bad faith rezoning in violation of state law is not truly irrational).

[21.] As found by the trial court, the commissioners have consistently testified to their reasons for denying reapproval:

> The [c]ommissioners testified that they were concerned about whether out[-]of[-]state garbage would be allowed at the landfill; that a majority of the commissioners wanted a compost facility [instead of a solid waste facility]; that some of the new commissioners objected to [the] location of the landfill and the size of the "pile." Additionally, [the] [c]ommissioners testified from the very first [that] they were concerned about the loss of "local control" and the fact that the size of the project changed from time to time – seemingly growing bigger as time went on.

These reasons may be irrelevant in determining whether County's conduct was arbitrary and capricious. But they are, nonetheless, legitimate concerns and not truly irrational.

[22.] Landfill also contends that it has a substantive due process claim because of the ill will and personal bias of the commissioners toward Landfill. Yet, the obvious evidentiary proof problems aside, ill will and personal bias alone are not enough to rise to the level of a substantive due process claim. *Bituminous Materials*, 126 F3d at 1071.

> [I]t would be inconsistent with the high threshold we established in *Chesterfield* to hold that a substantive due process claimant will survive summary judgment by alleging that a land use planning decisionmaker does not like the plaintiff. That sort of inquiry would indeed turn the federal courts into zoning boards of appeal.

Id.

[23.] While we recognize that "there may be cases where land-use decisions are 'so corrupted by the personal motives of local government officials that due process rights are implicated,'" this is not such a case. Iowa Coal Mining Co., Inc. v. Monroe County, Iowa, 257 F3d 846, 853 (quoting *Bituminous Materials*, 126 F3d at 1071). For example, in Wilkerson v. Johnson, the decisionmaker denied the plaintiff's barbershop license solely for the purpose of protecting himself against competition, thus undermining the credibility of the governing process. 699 F2d 325, 328-29 (6thCir 1983). Herein, the trial court concluded:

> After two trials and numerous depositions and hearings, it remains impossible to determine how and why ill will developed between the commissioners and Mr. McManus, [the manager of Landfill.] It is impossible to determine who is primarily at fault. It is impossible to determine the depth of this ill will or its impact on the County's May 3, 1994 decision. Thus, as in Bituminous Materials, Inc. v. Rice County, 126 F3d 1068, 1071 (8thCir 1997), I conclude that this allegation is far too insubstantial to support a substantive due process claim.

Landfill has not presented sufficient evidence of the sort of "corruption by personal motives" necessary to support a substantive due process claim.

[24.] Landfill further alleges that County's decision was merely a reaction to the opposition of over 400 private citizens, which arose after Landfill's application to BME. In *Lemke*, the petitioners alleged that the county zoning board's refusal to change the zoning ordinance to allow for solid waste disposal, in light of the county commission's previous approval, was a violation of substantive due process because the decision was based on public opposition. 846 F2d at 470. Judge Arnold responded:

> Such a claim is easily made in every zoning case, and is the stuff of which state administrative law is made. The state courts are open to hear, and do hear, such claims routinely. I see no reason to read the Due Process Clause as a constitutionalized Administrative Procedure Act setting up the federal courts as a forum for the review of every run-of-the-mill land-use dispute. In the present case, plaintiffs' theory is that their application was denied "mostly because the citizens [of Cass County] were offended by the transporting of Omaha, Douglas County, garbage into [a] Cass County landfill. . . . " That sort of xenophobic, anti-big-city motivation could, I am sure, often be credibly charged as to land-use decisions. It may amount to arbitrary or capricious decision making for purposes of state administrative law * * * But it is far from irrational.

Id. at 472 (internal citation omitted). We recognize that County arbitrarily exercised its governmental power, but we cannot say that the action was baseless. A response by elected officials to political pressure and public opposition by its electorate is not truly irrational conduct.

[25.] **3. Whether the trial court abused its discretion in denying County's claim for costs and disbursements in the amount of $14,771.26.**

[26.] County applied to the circuit court for costs and disbursements under SDCL 15-17-37, which provides:

> The prevailing party in a civil action or special proceeding *may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial*. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts and other similar expenses and charges. These expenditures are termed "disbursements" and are taxed pursuant to § 15-654(d).

(emphasis added). The award of such disbursements is made at the discretion of the court. Ridley v. Lawrence County Comm'n, 2000 SD 143, ¶12, 619 NW2d 254, 259; Michlitsch v. Meyer, 1999 SD 69, ¶15, 594 NW2d 731, 733 (citing SDCL 15-17-52; SDCL 15-15-53). Thus, we review the court's denial of these costs under the abuse of discretion standard. Zahn v. Musick, 2000 SD 26, ¶50, 605 NW2d 823, 833 (citing High Plains Genetics Research, Inc. v. JK Mill-Iron Ranch, 535 NW2d 839, 846 (SD 1995)).

[27.] The circuit court denied County's application for two reasons. First, approximately one third of County's application was attempting to recover costs of the litigation in *Tri County I*, a case in which it did not prevail and was not entitled to reimbursement. 535 NW2d at 765. Second, County was not the innocent party in this case, in that its arbitrary and capricious denial of the permit was the cause of the entire lawsuit. *Id.* We find the court's reasoning to be soundly supported by the record. *See Michlitsch*, 1999 SD 69 at ¶12, 594 NW2d at 734 (denying costs to non-innocent party was not an abuse of discretion). "We cannot say that the trial court's denial was clearly against reason and evidence or that a judicial mind, in view of the law and circumstances, could not have reasonably reached the same conclusion." *Id.* Therefore, the denial of costs and disbursements in this case was not an abuse of discretion.

[28.] We affirm.

[29.] AMUNDSON and KONENKAMP, Justices, and, GORS, Acting Justice, concur.

[30.] SABERS, Justice, dissents.

SABERS, Justice (dissenting).

[31.] One might have no real problem with this decision IF the judge held a trial, listened to the evidence, determined credibility of the witnesses, considered the arguments and briefs of counsel, and impartially decided the case on the facts. But, for the judge to jump the gun and decide this case on summary judgment without a trial is simply dead wrong.

[32.] The summary judgment decision of the judge without a trial violates our remand instructions, which were, as stated in the majority opinion at ¶6:

> We remanded the action for a factual determination of whether County's conduct was "truly irrational" in order to sustain Landfill's § 1983 claim and whether Landfill had a protected property interest in the approved permit.

It seems incredible that the judge jumped the gun *legally* in *Tri County II* and jumped the gun again *factually* in *Tri County III*. We should send it back until it is done right both factually and legally.

[33.] As stated in my writing in *Tri County II,* 2000 SD 148 at ¶¶44-46, 619 NW2d at 676 (Sabers, J., concurring specially in part and dissenting in part):

> The facts underlying our holding in *Tri County I* must rise to the level of the "truly irrational" standard and not merely an arbitrary and capricious action to create liability for the County in a § 1983 claim. Yet that does not mean our determination in *Tri County I* that the actions of the County were arbitrary and capricious negates the possibility of such a showing. In fact, they substantially support it.
>
> A County is bound by the actions of its duly elected commissioners. *See* McQuillin, Municipal Corporations
>
> § 26.81.20 (3d ed 1995) (discussing the validity of subsequent actions by commissioners). Therefore, a subsequent reversal of a prior decision by *newly elected* commissioners is clearly wrong, "arbitrary and capricious." These facts under *Chesterfield* go a long way to "give rise to a violation of rights secured by the Constitution," even if it does not do so "automatically." *See Chesterfield*, 963 F2d at 1104. Therefore, even if not "automatically" "truly irrational" and subject to

> summary judgment by the court, it is prima facie evidence for the trial court in this case.
>
> Therefore, to show that a protected property interest exists, it is only necessary for Tri County Landfill to show "a lack of discretion on the part [of Brule County to deny the issuance of the permit]." *See Villager Pond, Inc.*, 56 F3d at 379. The majority's statement that "[p]rior decisions from an elected official's successor in no way binds the elected official currently occupying the elected position" is wrong. While it is beyond dispute that incoming officials can change "policies, procedures, and even key personnel of their predecessors . . . and implement their own policies" they cannot ignore a constitutionally protected property interest if it is found to exist. On remand, this is part and parcel of the factual questions to be determined by the court.

[34.] How in the world can the judge determine whether the actions of Brule County (and especially those of the newly elected commissioners) were "truly irrational" without making determinations of credibility, motive and intent?[6]

[35.] We should reverse and remand for a fair trial.

---

[6] Finally, Landfill's concession on oral argument that no genuine issues of material fact remained and that the only remaining issues were legal conclusions to be drawn from uncontested facts is clearly wrong because of issues of credibility, motive and intent.

APPENDIX B

STATE OF SOUTH DAKOTA
[SEAL]
THIRD JUDICIAL CIRCUIT COURT
P.O. Box 1358
HURON, SOUTH DAKOTA 57350
(605) 353-7171
FAX (605) 353-7306

CHAMBERS OF
JON R. ERICKSON
JUDGE

MARIE H. FAWCETT
COURT REPORTER

April 18, 2001

Mr. Robert R. Schaub
Larson, Sundal, Larson, Schaub & Fox, P.C.
PO Box 547
Chamberlain, SD 57325-0547

Ms. Steven M. Johnson
Mr. Russ Janklow
Ms. Sheila Woodward
Johnson, Heidepriem, Miner, Marlow & Janklow, L.L.P.
431 N. Phillips Ave. #400
Sioux Falls, SD 57104

Re: Tri County Landfill Association, Inc. v. Brule County

(Filed April 19, 2001)

Counsel:

This Court's previous decision was reversed and remanded by the South Dakota Supreme Court. The Court's instructions were explicit. This Court is to determine:

1. Whether the previously determined arbitrary and capricious conduct of the Brule County Commissioners in denying a second requested permit to build a landfill was also truly irrational?

2. **If so**, whether Tri County Landfill Association, Inc., had a clear entitlement to the permit so that there was no discretion left with the County?

Both parties now move for summary judgment.[1] For reasons set forth below, the Court grants Brule County's motion for summary judgment concluding that the County's actions in denying a second requested permit to build a landfill cannot be considered "truly irrational."

FACTS[2]

TCLF was formed in 1992 as a non-profit corporation to develop, construct, and maintain a regional landfill in Brule County. TCLF members are area county and municipal governmental bodies exercising joint power agreements, and TCLF's voting delegates are officials of the member counties and cities.

Brule County became a member of TCLF in 1992, passing a resolution declaring "it is necessary to join together with other jurisdictions to allow for an economical manner in which to handle solid wastes," and "that it is in the best interest of [County's] Citizens to join in a Regional Landfill to be located at the Brule County Landfill Site near Pukwana."

Brule County sent officials to TCLF meetings and TCLF officials regularly attended the Brule County commission meetings to update the commissioners on the progress of the facility plans and permitting process. TCLF conducted and participated in numerous public meetings, and regularly maintained local media coverage to ensure that Brule County and the general public was informed of its plans. Throughout much of this long process, no public opposition was expressed. Public opposition started to form after the South Dakota Department of Environment and Natural Resources (DENR) issued its recommendation that the permit be approved.

---

[1] Both parties essentially admit there are no genuine issues of material fact which need to be tried, but rather it is a matter of interpreting how those facts apply under the law.

[2] This case has twice been reviewed by the Supreme Court. In setting forth these facts I have borrowed liberally from the findings of those two opinions.

TCLF purchased the 40-acre facility site from Brule County, pursuant to a resolution passed by the Brule County Commission on February 9, 19931 [sic]. Also obtained from the Commission, after a noticed hearing on April 27, 1993, a special exception to the local zoning ordinance to locate a "sanitary landfill for the proper disposal of refuse . . . " Brule County's zoning board approved the landfill on March 16, 1993. However, Brule County never passed a specific resolution for the sole purpose of approving the facility proposed by Association, despite these acts approving the purchase of the land and granting the special zoning exception.

TCLF proceeded with its development plans, publishing notice of its intent to apply for a solid waste disposal facility operation permit from DENR, constructing ground water monitoring wells at the site, and letting bids for construction and operation. DENR determined that the permit application was in conformity with applicable laws and regulations, that the facility is technically sound and in compliance with the relevant laws and regulations, and recommended issuance of a permit to TCLF to construct and operate the facility.

On July 29, 1993, DENR published its recommendation of approval of the permit application in the local newspaper, the Chamberlain Register, and sent actual notice to affected persons, including Brule County. An objection was filed by a private resident of Pukwana. Brule County did not file an objection. DENR scheduled a contested hearing on TCLF's application before the Board of Minerals and Environment (BME) to determine whether the proposed facility was properly designed and safe. A hearing on the contested case petition was scheduled for October 20, 1993, before the Board of Minerals and Environment (BME), but was continued until January 9, 1994.

Prior to the January 19, 1994 BME hearing, an election changed the membership of the Brule County Commission and a majority of members now opposed the creation of the landfill. Shortly thereafter, Brule County withdrew its membership in TCLF. Additionally, private citizens began to organized [sic] opposition to the landfill. At the hearing, the objecting party contended that TCLF had never obtained Brule County's approval as required by SDCL 34A-6-103. Three Brule County commissioners attended the hearing and submitted a letter objecting to the approval of the permit. Their letter did not question the safety of the facility design and it did not allege Brule County had not given its prior approval or that such approval had expired.

BME issued its findings of fact and conclusions of law on February 16, 1994, and concluded that Landfill's permit complied with South Dakota's regulations, but Landfill had failed to obtain county approval of the facility within six months prior to BME's approval pursuant to SDCL 34A-6-103. BME further concluded that the issuance of Landfill's permit was conditioned on Landfill obtaining county reapproval and compliance with DENR's groundwater monitoring requirements. TCLF was directed by BME to again seek approval of Brule County.

As directed, pursuant to SDCL 34A-6-103 as it then was written, on May 14, 1994, TCLF requested a renewed approval from Brule County's Commission. This request was denied. The only recorded objection raised on the record by the commissioners when considering this request was whether out-of-state garbage would be accepted at the facility. There was no discussion or objection to design or safety of the facility.

TCLF appealed the decision of the county commission, seeking relief in circuit court. Following a de novo trial, the circuit court concluded that the action of the Brule County Commission in refusing to pass a resolution reapproving Association's proposed facility was arbitrary and capricious. The court entered an order directing Brule County to grant renewed approval of the facility.

Judge Tucker, sustained by the Dakota Supreme Court found that Brule County "had the right to participate [in the contested case hearing before BME], had the right to appeal the BME's decision, and chose not to participate in any appeal of the BME's decision," did not take an appeal from BME's decision.[3]

Judge Tucker, sustained by the Dakota Supreme Court found that TCLF "is an aggrieved party" in that Brule County's refusal to pass a resolution approving their facility "directly affects Association as it prevents this non-profit group from proceeding with its plans to use their property for the purpose for which it was purchased and prevents them from fulfilling the purpose of Association's corporate existence."[4] Last, the Court further found that the Brule County Commissioners willfully and unreasonably disregarded the decision of the BME.[5]

---

[3] **Tri County Landfill Assn., Inc. v. Brule County**, 535 N.W.2d 760 (SD.. 1995) 1995 S.D. Lexis 99 [Tri-County I].

For those reasons, Judge Tucker and the Supreme Court concluded that Brule County's action in refusing to approve Association's facility was arbitrary and capricious.

Analysis

Summary Judgment:

In *Wilson v. Great N. Ry.*, 83 S.D. 207, 157 N.W.2d 19 (S. D. 1968), the South Dakota Supreme Court set out certain guiding principles on the use of summary judgment: They are:

(1) The evidence must be viewed most favorable to the nonmoving party;

(2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law;

(3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists.

---

[4] Ibid.

[5] Ibid.

(4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them.

(5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant.

(6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Was Brule County's denial of reapproval of the permit "truly irrational?"

Under 42 USC § 1983, a party may recover damages for the "'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States caused by any person acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.'" *Michigan Envtl. Resources Assocs., Inc. v. County of Macomb*, 669 F. Supp. 158, 159 (ED Mich 1987) (quotation omitted). To sustain a § 1983 action, plaintiff must prove two elements. Id.

(1) "[T]hat the defendant acted under color of state law."

(2) That "the defendant deprived the plaintiff of a federal right, either statutory or constitutional."

The parties do not dispute that County's conduct was under "color of state law." Therefore, the first element of a § 1983 cause of action is clearly satisfied. As pointed out by Justice Amundson in *Tri County Landfill Ass'n v. Brule County*, 2000 SD 148, 619 N.W.2d 663 (S. D. 2000), [Tri County II] "the crux of our review focuses on whether Landfill was deprived of any "statutory or constitutional right."

TCLF originally alleged in its complaint in this case that revocation by Brule County was without prior notice to TCLF and was arbitrary, capricious, willful, malicious, and an unconstitutional taking without just compensation, due process and denied the [Landfill] equal protection under both the South Dakota and United States Constitutions and is actionable under [42] USC 1983 and 1985. Id., ¶12. Citing *Tri County II*, ¶39. TCLF now argues that this court must decide whether there was a substantive due process violation.

TCLF argues that the Brule County's conduct proves that the Commissioners used their powers for purposes of oppression, that the abuse of this governmental power shocks the conscience and was legally irrational since it was not keyed to any legitimate state interest. Further, it argues that the Brule County Commissioners were unduly influenced by a private citizen, Lloyd Priebe, his family and friends, who organized the opposition as a result of the Priebe's failing to obtain the successful bid in building and managing the landfill.

"Substantive due process" provides that "'certain types of governmental acts [violate] the Due Process Clause regardless of the procedures used to implement them.'" *Macomb*, 669 F. Supp. at 159-60 (quoting *Nishiyama v. Dickson County Tennessee,* 814 F.2d 277, 281 (6thCir 1987)). It is well settled that the doctrine of substantive due process,

> does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.

The United States Supreme Court "'has always been reluctant to expand the concept . . . because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223, 242 (Cal Ct App 1996) (quoting *Albright v. Oliver*, 510 U.S. 266, 271-272, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114, 122 (1994)). As pointed out by Justice Amundson, "the reluctance by many courts to expand the doctrine of substantive due process under a 42 USC § 1983 action has been grounded on the principle that "'the violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.'" *Tri County*, supra ¶15 (quotations omitted).

The government action complained of must be shown to be "truly irrational", that is, "something more than arbitrary, capricious, or in violation of state law." *Tri County*, supra. ¶16. In *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1103-04 (8thCir 1992), the Eighth Circuit Court of Appeals ruled that,

> the plaintiff must allege something more than that the government decision was arbitrary, capricious, or in violation of state law. Such claims, it asserted, are better addressed to state courts and administrative bodies. Otherwise, every violation of state law could be turned in to a federal constitutional tort. The . . .

> substantive-due-process claims should be limited to "truly irrational" governmental actions .... An example would be attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet.

Quoting *Lemke v. Cass County, Nebraska*, 846 F.2d 469, 470-72 (8th Cir. 1987), the Eighth Circuit concluded:

> Every appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "the violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." [Cites omitted].

Why then did the Brule County Commission refuse to approve the permit? The issue of garbage disposal is one drawn to public controversy. That is certainly reflected in this instance. Between the concept stage and the reality stage of development, a group formed to oppose the placement of the landfill.[6] Whether a large group, or merely a vocal minority, they raised strenuous opposition to the TCLF. Between the time the first approval was given, and the request for reapproval there had been County Commission election and the makeup of the Brule County Commission had changed. "It was obvious that the majority of the newly elected members were opposed to this facility." *Tri County I*, surpa. [sic] at p. 764.

---

[6] In this instance, it is alleged that a private citizen, Lloyd Priebe unduly influenced the Commissioners. TCLF's dilemma is that Lloyd Priebe is a private citizen and this still remains part of the political process. Whether right or wrong, Lloyd Priebe can organized and attempt to influence the political process in any *legal* manner he so desires.

Each of the opposing County commissioners have been deposed at least twice, and have testified at least once at the trial leading to the decision in *Tri County I*. Their testimony has been consistent. The Commissioners testified they were concerned about whether out of state garbage would be allowed at the landfill; that a majority of the commissioners wanted a compost facility; that some of the new commissioner's [sic] objected to location of the landfill and the size of the "pile." Additionally, Commissioners testified from the very first they were concerned about the loss of "local control" and the fact that the size of the project changed from time to time – seemingly growing bigger as time went on. The Commissioners testified they were concerned about the concept of bigger not being the best way of handling this issue.

Last, the Commissioners argue they relied upon the provisions of SDCL 34A-6-103. That statute entitled "County approval required for solid or medical waste transportation, storage, treatment or disposal," in 1994 provided:

> Any application to the Board of Minerals and Environment permit for a facility for the transportation, storage, or disposal of solid waste or medical waste pursuant to this chapter shall include a resolution by the governing body of the

> county in which the facility is to be located approving the proposed facility. *Approval by the county within no more six months before the issuance of the permit by the Board of Minerals and Environment shall be considered as a condition for the issuance of the permit.* [Emphasis provided].

a. Ill-will:

This matter is further complicated by the ill will between some of the commissioners and TCLF's manager, Larry McManus. After two trials and numerous depositions and hearings, it remains impossible to determine how and why ill-well developed between the commissioners and Mr. McManus. It is impossible to determine who is primarily at fault. It is impossible to determine the depth of this ill-well or its impact on the County's May 3, 1994 decision. Thus, as in *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1071 (8th Cir. 1997), I conclude that this allegation is far too insubstantial to support a substantive due process claim. See also, *Randy's Sanitation, Inc. v. Wright County, Minnesota*, 65 F. Supp.2d 1017, 1029 (US Dist. Ct., D. Minn. 1999).

b. SDCL 34A-9-103:

Significant to this issue is the fact that while TCLF has consistently challenged the constitutionality of this provision, they have never brought it to a noticed hearing. Prior to May 3, 1994, no one had challenged this provision, and TCLF admits that its provisions where *not* challenged before the Brule County Commissioners made its decision to deny the permit. In October, 2000, the South Dakota Supreme Court reaffirmed the general rule of constitutional interpretation that states "[t]here is a strong presumption that a statute is constitutional and the party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional." [Cites omitted]. *Casazza v. State*, 2000 SD 120 ¶9, 616 N.W.2d 872 (S. D. 2000).

Thus, under these facts, particularly in light of the specific direction by BME, the Commission legitimately believed it had the discretion, and the right to review its original resolution approving the proposed facility. In other words, BME, independently believed that SDCL 34A-6-103 was constitutional and must be met. Prior to May 1994, the SDCL 34A-6-103 was presumed constitutional. The commissioners, as did BME, had a right to rely upon the dictates of that statute.

In *Chesterfield* supra. at p. 1103, the Eighth Circuit found it significant that "the City was not aware of the invalidity of [of its zoning ordinance] at the time." The Court went on to say a:

> conventional planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus, or the like – which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate.

c. *Public Opposition:*

TCLF argues that the Commissioners were unduly influenced by an opposition group lead by Lloyd Priebe, an unsuccessful bidder on the project. TCLF argues that the Commissioners made their decision solely on this opposition and not on the basis of any legitimate evidence. Thus, they argue that this action was "truly irrational."

However, TCLF also admits that the opposition was made up of over 400 private citizens and that this group did nothing improper. They organized, they petitioned and they opposed this facility. Unfortunately for the opposition and the commissioners, it came too late in the process.

d. The Commissioner reasons:

In determining that the actions of the Commission were arbitrary and capricious, Judge Tucker found that some of the objections set forth by the commissioners were not addressed at the May 3, 1994 hearing. Further, he found that some of their objections were not valid given the facts. Last, he concluded that the commissioners willfully and unreasonably disregarded the decision of the BME.

It is interesting to note that in 1996, the South Dakota Legislature adopted SDCL 34A-6-103.1, which states that certain information must be presented to the County Commission at the first meeting held to consider the question of county approval. Those criteria are:

(1) Size and capacity;

(2) Location and legal description;

(3) Area to be served by the facility;

(4) Type of waste to be accepted;

(5) Types of state permits to be applied for;

(6) If applicable, the type of liner and leachate collection system;

(7) If the facility is to include an incinerator, the type and model of the incinerator;

(8) If the facility is for the disposal of ash, the method of disposal of the ash;

(9) Expected lifespan of the facility; and

(10) If the facility is a materials recovery facility, information about the type of materials recovery facility and whether the materials will be presorted or commingled.

At least three of the ten criteria the Legislature found important set forth in SDCL 34A-6-103.1 were areas of concern that the commissioners consistently voiced [1,2,3]. Additionally, the commissioners voiced concerns about loss of local control. As conceded at oral argument, "local control" is almost always a major issue in South Dakota government.

Conclusion:

Under then existing SDCL 34A-6-103, the County was exercising a discretionary function. This Court, after much thought agrees with the logic of the Eighth Circuit Court of Appeals in *WMX Technologies, Inc. v. Gasconade County, Missouri*, 105 F.3d 1195, 1201, when it concluded:

> Legislative bodies are given broad latitude in their legislative determinations, "and are given broad latitude in their legislative determinations," and it is not the province of the courts to monitor the inputs into each legislative decision .... We only ask whether a conceivable rational relationship exists between the ordinance and legitimate governmental ends.

While the current scenario differs in that it was not a pure legislative act, it was certainly a discretionary act under then existing SDCL 34A-6-103.

Under this factual scenario, assuming all facts in the light most favorable to TCLF, I cannot conclude that the Commissioners' previously determined arbitrary and capricious action in refusing the permit was "truly irrational." Assuming all facts in the light most favorable to TCLF, I cannot conclude that the County's actions lacked a conceivable rational relationship between the denial of the permit and a legitimate governmental interest. Therefore, Brule County's motion for Summary Judgment is granted. Because of this decision, the Court need not address the remaining issues.

Sincerely yours,

/s/ Jon R. Erickson
Jon R. Erickson
Circuit Court Judge

APPENDIX C

STATE OF SOUTH DAKOTA
[SEAL]
THIRD JUDICIAL CIRCUIT COURT
P.O. Box 1358
HURON, SOUTH DAKOTA 57350
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CHAMBERS OF JON R. ERICKSON
JUDGE

MARIE H. FAWCETT
COURT REPORTER

May 31, 2001

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Ms. Sheila S. Woodward
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PO Box 667
Yankton, SD 57078-0667

Re: Tri County Landfill Association, Inc. v. Brule County-Memorandum Opinion - Costs and Disbursements

Counsel:

Brule County has filed an Application for Costs and Disbursements in the amount of $14,771.26. Tri County Landfill (TCLF) has filed objections.

Facts

This has been a long, hard-fought and arduous case. In a companion case, TCLF successfully argued that the "County's refusal to pass a resolution of approval was arbitrary and capricious." *Tri Cty, Landfill Assn., Inc. v. Brule Cty,* (Tri County I), 535 N.W.2d 760 (SD 1995). In the present case, TCLF initially won a motion for partial summary judgment on the issue of liability, and a substantial award for damages after a court trial, only to have the case returned for further hearings on appeal. *Tri County Landfill Ass'n v. Brule County,* (Tri County II), 2000 SD 148, 619 N.W.2d 663. Then, based upon that Supreme Court ruling, this court granted Brule County summary judgment on the issue of liability.

As a result, expenses on the part of both parties have been extensive.

TCLF lodges numerous objections. First, it argues generally that County's application is not made in good faith and asks that the Court deny the entire application. The remaining, more specific objections essentially cover the following three categories:

1. County is trying to recoup costs for the appeal of Tri County I, which they lost before the Supreme Court, including transcript costs for a BME hearing, and deposition costs.

2. County is trying to recoup FAX costs, Telephone expenditures and copies without any indication of (a) actual costs and (b) without any showing that they were necessarily incurred in gathering evidence or bringing the matter to trial; and

3. County is trying to recoup deposition costs and witness fees for a person who was never called to testify at trial (Ron Olson).

Analysis

Both parties agree that this matter is controlled by SDCL 15-17-37, which provides:

> The prevailing party in a civil action or special proceeding may recover *expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial.* Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts and other similar expenses and charges. These expenditures are termed "disbursements" and are taxed pursuant to § 15-6-54(d). Emphasis provided.

"A court has the discretion to deny a prevailing party's motion for disbursements under SDCL 15-17-37." *Ridley v. Lawrence County Comm'n,* 2000 SD 143, 619 N.W.2d 254, ¶ 12. In *Michlitsch v. Meyer,* 1999 SD 69, 594 N.W.2d 731, 733 ¶ 15, the Supreme Court found that while SDCL 15-17-37 does not provide the court discretion to deny the recovery of disbursements, SDCL 15-17-52 and SDCL 15-17-53.2 do. In *Michlitsch,* the trial court denied the prevailing party recovery, finding "I find no innocence on either side[.]" The Supreme Court specifically found that "the record supports the court's statement." The Supreme Court went on to affirm the judgment of the stating, "we cannot say that the trial court's denial was clearly against reason and evidence or that a judicial mind, in view of the law and circumstances, could not have reasonably reached the same conclusion." Ibid. ¶ 12.

As I review this case, I remember well the following comment of Justice Sabers in his dissent in Tri County II. "The facts underlying our holding in Tri County I must rise to the level of the "truly irrational" standard and not merely an arbitrary and capricious action to create liability for the County in a § 1983 claim. Yet that does not mean our determination in Tri County I that the actions of the County were arbitrary and capricious negates the possibility of such a showing. *In fact, they substantially support it.*" [Emphasis provided]. Ibid. ¶ 44.

The County lost Tri County I. Since it was not the prevailing party it could not recover expenditures incurred to bring that matter to trial. Therefore, it paid its own costs. The County has now won Tri County II subject to Supreme Court review. Approximately one-third of its Application asks to recoup expenses which previously it could not.

While the two causes of action were different, the facts were essentially the same. Therefore, depositions, hearing transcripts and other evidence produced and paid for by the County in Tri County I were utilized by counsel from both sides in the second cause of action. This was both economically pragmatic and wise legal strategy. Under these circumstances, I do not believe it would be in the interest of justice to allow the County, whose clearly arbitrary and capricious conduct spurred this law suit to recoup expenses in this law suit which previously it could not.

Additionally, similar to the trial court in *Michlitcsh,* I find that the conduct of the County was not innocent. In truth, the innocent party is TCLF. While I could not conclude that the County's conduct was truly irrational, I certainly agree with my judicial brethren that the conduct was arbitrary and capricious. And, as I have previously found, that arbitrary and capricious conduct did substantially damage TCLF.

Therefore, based upon the discretion given this court under the provisions of SDCL 15-17-52[1] and SDCL 15-17-53[2], I deny the entire Application.

County's Application for Costs and Disbursements is denied.

Sincerely yours,

/s/ Jon R. Erickson
Jon R. Erickson
Circuit Court Judge

---

[1] SDCL 15-17-52. Limit of taxation of disbursements.

The court may limit the taxation of disbursements in the interests of justice.

[2] SDCL 15-17-53. Reduction or disallowance of disbursements for hardship.

The court may reduce or disallow a taxation of disbursements that would be oppressive or work a hardship.

APPENDIX D

#19175-a-PER CURIAM
#19193

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

TRI COUNTY LANDFILL ASSOCIATION, INC., Plaintiff and Appellee,

v.

BRULE COUNTY, SOUTH DAKOTA Defendant and Appellant.

* * *

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

* * *

THE HONORABLE TIM D. TUCKER
Judge

* * *

(Filed August 25, 1995)

ROBERT R. SCHAUB of Larson, Sundall, Larson, Schaub & Fox Chamberlain, South Dakota	Attorneys for plaintiff and appellee.
PATRICIA A. CARLSON Brule County Ltd. Deputy State's Attorney Pierre, South Dakota	

DOUGLAS M. DEIBERT of
Cadwell, Sanford & Deibert
Sioux Falls, South Dakota

Attorneys for defendant
and appellant.

* * *

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Gloria J. Engel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office.
In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Pierre, S.D. this 23rd day of August, 1995.

/s/ Gloria J. Engel
Clerk of the Supreme Court

/s/ By Dorothy A. Smith
Deputy

CONSIDERED ON
BRIEFS ON
JULY 19, 1995

OPINION FILED
AUG 02 1995

PER CURIAM.

Brule County (County) appeals from an order directing its County Commission to approve the facility plans of Tri County Landfill Association, Inc. (Association) to construct a regional sanitary landfill. We affirm.

FACTS

Over the past decade, numerous revisions to state and federal laws have forced significant changes in the manner in which communities dispose of waste and, indeed, have forced the closure of numerous landfills. In anticipation of the changing needs of area communities, Tri County Landfill Association, Inc. was formed in 1992 as a non-profit corporation to develop, construct, and maintain a regional landfill in Brule County. Association members are area county and municipal governmental bodies exercising joint power agreements, and Association's voting delegates are officials of the member counties and cities. County became a member of Association in 1992, passing a resolution declaring "it is necessary to join together with other jurisdictions to allow for an economical manner in which to handle solid wastes," and "that it is in the best interest of [County's] Citizens to join in a Regional Landfill to be located at the Brule County Landfill Site near Pukwana."

County sent officials to Association meetings and Association officials regularly attended the county commission meetings to update the commissioners on the progress of the facility plans and permitting process. Association conducted and participated in numerous public meetings, and regularly maintained local media coverage to ensure that County, as well as the public in general, was informed of its plans from the outset. Throughout the long process, no public opposition was expressed until after the state Department of Environment and Natural Resources (DENR) issued its recommendation that the permit be approved.

Association purchased the 40-acre facility site from County, pursuant to a resolution passed by the county commission on February 9, 1993[1] after obtaining from

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[1] The February 9, 1993 resolution stated, in pertinent part:

"Whereas, Federal and State Law has mandated new standards for solid waste disposal; and ... under such standards, the existing landfill would be inadequate to meet the

(Continued on following page)

County a special exception to the local zoning ordinance to locate a "sanitary landfill for the proper disposal of refuse . . . " County's zoning board approved the landfill on March 16, 1993 after Association had presented its facility design plans to County. The special zoning exception was granted on April 27, 1993, following notice of Association's request, a public meeting, and a hearing. County did not, however, pass a specific resolution for the sole purpose of approving the facility proposed by Association, despite these acts approving the purchase of the land and granting the special zoning exception.

Association proceeded with its development plans, publishing notice of its intent to apply for a solid waste disposal facility operation permit from DENR, constructing ground water monitoring wells at the site, and letting bids for the construction and operation. DENR determined that the permit application was in conformity with applicable laws and regulations, that the facility is technically sound and in compliance with the relevant laws and regulations, and recommended issuance of a permit to Association to construct and operate the facility.

On July 29, 1993, DENR published its recommendation of approval of the permit application in the local newspaper, the *Chamberlain Register*, and sent actual notice to affected persons, including County. An objection

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needs of the residents of Brule County, South Dakota, its municipalities, therein and surrounding environs; and . . . Brule County owns . . . real estate . . . that has been determined to be an acceptable site for solid waste disposal, . . . Therefore . . . the Board of County Commissioners . . . sells forty acres to Tri County Landfill Association, Inc., for the purpose of constructing and operating a landfill . . . "

was filed by a private resident of Pukwana; County did not file an objection. DENR scheduled a contested hearing on Association's application before the Board of Minerals and Environment (BME) to determine whether the proposed facility was properly designed and safe.[2] Prior to the contested case hearing, County withdrew its membership in Association.

At the hearing, the objecting party contended that Association had never obtained County's approval as required by SDCL 34A-6-103.[3] Three county commissioners attended the hearing and submitted a letter objecting to the approval of the permit. Their letter did not question the safety of the facility design and it did not allege County had not given its prior approval or that such approval had expired.

Following the hearing, BME specifically found that Association's permit application was complete, and detailed the manner in which it met with each of the applicable requirements. However, BME determined that, by the time of the hearing, more than six months had passed since County approval had been given. Thus, it directed Association to again seek approval of County. When Association requested a renewed approval from County's Commission,[4] its request was denied. The only question raised by the commissioners when considering this request was whether out-of-state garbage would be accepted at the facility, and there was no discussion questioning its design or safety in any respect.

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[2] This hearing was originally scheduled for October 20, 1993, a date which would have been within six months from the date County gave Association its zoning approval. However, due to a motion for continuance filed by the objecting party, the hearing was delayed until after six months passed from the date of issuance of the zoning approval.

[3] SDCL 34A-6-103 states:

> Any application to the [BME] for a permit for a facility for the transportation, storage or disposal of solid waste or medical waste pursuant to this chapter shall include a resolution by the governing body of the county in which the facility is to be located approving the proposed facility. Approval by the county within no more than six months before the issuance of the permit by the [BME] shall be considered as a condition for the issuance of the permit.

Association appealed the decision of the county commission, seeking relief in circuit court. Following a de novo trial, the circuit court concluded that the action of the Brule County Commission in refusing to pass a resolution reapproving Association's proposed facility was arbitrary and capricious. The court entered an order directing County to grant renewed approval of the facility. County appeals. Because of the unique and exigent circumstances present in this case, we suspended the rules and permitted an expedited appellate procedure pursuant to SDCL 15-26A-2.

I. COUNTY IS BOUND BY THE DECISION OF THE BOARD OF MINERALS AND ENVIRONMENT.

County challenges BME's factual finding that the actions of County constituted a resolution of approval as required by SDCL 34A-6-103. However, County did not take an appeal from BME's decision. The circuit court correctly concluded that County "had the right to participate [in the contested case hearing before BME], had the right to appeal the BME's decision, and chose not to participate in any appeal of the BME's decision[.]" Consequently, it is unnecessary for us to consider this issue further.[6]

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[4] A change in membership on the Commission occurred before the BME hearing was held, creating a majority of members who opposed the landfill.

II. ASSOCIATION IS AN "AGGRIEVED PARTY" AND ENTITLED TO APPEAL COUNTY'S ACTION.

Next, County asserts that Association was without standing to appeal their refusal to reapprove the landfill facility because they are not an "aggrieved party." SDCL 7-8-27 provides that "[f]rom all decisions of the board of county commissioners upon matters properly before it, there may be an appeal to the circuit court by any person aggrieved[.]" *Wold v. Lawrence County Comm'n,* 465 N.W.2d 622 (S.D. 1991). We have declared that "this statute provides for an appeal from decisions of the board of county commissioners only to such persons who suffer personal or individual grievances, as distinguished from those grievances suffered by taxpayers or the public generally." *Simpson v. Tobin,* 367 N.W.2d 757 (S.D. 1985) (citation omitted).

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[6] Even though we have concluded that County is bound by the findings of BME because it did not appeal BME's decision, it should be pointed out that by the terms of SDCL 34A-6-103, County's approval of the facility was only valid for 6 months. Since more than 6 months had passed by the time of BME's decision, County's approval was no longer valid, and this issue is essentially moot. This is precisely why BME required Association to obtain renewed approval prior to the actual issuance of the permit.

> The concept of an "aggrieved party" is not new to this Court . . . the first in-depth analysis of "aggrieved party" regarding a test for standing was made by this Court in an appeal from a board of county commissioners' decision. *Barnum v. Ewing,* 53 S.D. 47, 220 N.W. 135 (1928). In *Barnum* we set forth the following test: "[W]e think ['any person aggrieved'] can only include such persons when they are able affirmatively to show that they are 'aggrieved' in the sense that [. . .] they suffer the denial of some claim of right either of person or property . . . . " *Id.* at 53, 220 N.W. at 138.

Keogan v. Bergh, 348 N.W.2d 462, 463 (S.D. 1984) quoting *In re Appl. of Northern States Power Co.,* 328 N.W.2d 852, 855 (S.D. 1983) (ellipses and brackets in original).

Applying these standards, it is clear that Association is an aggrieved party. Association appeals County's refusal to pass a resolution approving their facility. Without such a resolution, Association may not proceed to construct the landfill under the terms of the BME permit. This decision directly affects Association as it prevents this non-profit group from proceeding with its plans to use their property for the purpose for which it was purchased and prevents them from fulfilling the purpose of Association's corporate existence.[6] Clearly, Association is an aggrieved party and was entitled to appeal County's decision to the circuit court.

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[6] Association's corporate status was recognized by the South Dakota Secretary of State on May 8, 1992. The purpose of Association is developing, constructing and maintaining a regional landfill.

III. COUNTY'S REFUSAL TO PASS A RESOLUTION APPROVING ASSOCIATION'S SOLID WASTE FACILITY WAS ARBITRARY AND CAPRICIOUS.

The main issue is whether the circuit court erred in determining that County's action in refusing to approve Association's facility was arbitrary and capricious, and in directing it to pass a resolution approving the facility. Pursuant to SDCL 7-8-30, an appeal to the circuit court from the decision of the county commissioners is to be "heard and determined de novo," that is, the circuit court should determine the issues before it on appeal as if they had been brought before the court originally. We review the findings made by the circuit court using the clearly erroneous standard, giving due deference to the lower court's opportunity to view the evidence and witnesses. *Bryant v. Butte County,* 457 N.W.2d 467 (S.D. 1990). However, we accord no deference to the legal conclusions of the circuit court. *Id.*

County does not identify any particular basis upon which it challenges either the factual findings of the circuit court or the legal conclusion that it acted arbitrarily in denying Association's request. County simply lists the facts it suggests support rejection of Association's facility. In reviewing the extensive and detailed findings of the circuit court,[7] it is apparent that County presented

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[7] The circuit court made 63 factual findings in reaching its decision, including a determination that Association had submitted a complete application to DENR and that its application satisfied all laws and regulations applicable to a solid waste disposal facility. It also found that County had been fully informed of Association's facility plans from virtually the inception of the project, and had received actual notice at each step of the administrative permitting process. The court

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much of this same evidence below, and the court specifically found their objections to be without merit. Other factual matters were not presented to the circuit court. County does not, however, identify any particular finding of the circuit court as erroneous, and we are not required to search the record in an attempt to find a basis to reverse the decision of the circuit court. There is ample evidence in the record to support the factual findings made by the circuit court. Thus, we cannot say the findings are clearly erroneous.

County has also failed to articulate any basis which would justify a reversal of the circuit court's legal conclusion that their action was arbitrary and capricious. Action is arbitrary and capricious if it is based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken. *Hendriks v. Anderson,* 522 N.W.2d 499 (S.D. 1994); *Iversen v. Wall Board of Education,* 522 N.W.2d 188 (S.D. 1994); *Riter v. Woonsocket School Dist. # 55-4,* 504 N.W.2d 572 (S.D. 1993).

In this regard, we must review the factual basis supporting the circuit court's conclusion. The court's relevant findings state:

> 42. On May 3, 1994, the Association requested reapproval. It was unjustifiably denied. The only question raised by the commissioners was whether out of state garbage would be allowed

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found there was substantial public support for the facility, that approximately 20 unregulated small town dumps may be closed if the proposed facility is constructed, and that Brule County's existing landfill is not designed or operated with the environmental protections of the proposed facility.

at the landfill. No discussion was held as to whether the design was unsafe or that it violated or was prohibited under any Brule County ordinance or regulation.

43. Brule County's unreasonable refusal to grant [Association's] request for approval on May 3, 1994 was oppressive because a majority of the commissioners wanted a compost facility, which they admitted, was not allowed under Brule County's zoning ordinances.

* * *

58. [An objection to the] location of the landfill was voiced by some of the commissioners[. H]owever if the county commission objected to the location, they didn't have to sell the land or grant the Special Exception to [Association]. It would be unjust, and unfair for the county commission to now be able to change their decisions.

* * *

60. The plans are not hard to read and clearly show the eventual height along with the different phases of construction and the contours of the pile. The Court finds that the size of the pile is not a legitimate reason to now deny approval. The size of the final pile that [Association] requested approval of in May of 1994 is basically the same as the size of the pile that is contained in the plans that were presented to the county commissioners in the spring of 1993.

61. The Court further finds that the Brule County Commissioners willfully and unreasonably disregarded the decision of the BME.

Based upon these findings, the circuit court drew the following legal conclusions:

8. Brule County's willful refusal to reapprove [Association's] proposed landfill in light of the BME's decision was unjustifiable.

9. Brule County's unreasonable refusal to grant [Association's] request for approval on May 3, 1994 was oppressive, and arbitrary because a majority of the commissioners wanted a compost facility, which they admitted, was not allowed under Brule County's zoning ordinances.

10. The proposed facility and the granting of approval of the proposed facility by Brule County is in the best interest and general welfare of the public.

11. [Association's] proposed facility, if operated in accordance with [its] representations and the conditions adopted by the DENR, will be environmentally safe.

12. The BME has found that [Association's] landfill facility including the leachate collection system, and clay liner to be a safe design and Brule County cannot now recklessly disregard the BME's decision or argue that this landfill facility is an unsafe project because Brule County has had an opportunity to contest those issues before the BME.

* * *

16. A number of counties and municipalities relied upon the actions of the Brule County Commissioners in approving the sale of land and grant of special exception to [Association]. Other counties and municipalities have spent money in reliance [on] Brule County's approvals. For the Brule County Commissioners to stop this landfill

> facility now without any sound basis is not appropriate and [is] unreasonable.
>
> 17. The Brule County Commissioners' refusal to reapprove the [Association's] facility on May 3, 1994 was arbitrary, capricious and unreasonable.

The evidence presented at the de novo trial demonstrated that the newly-developed opposition to Association's proposed facility was not based on any legitimate concerns over the design or operation of the facility. Indeed, the state agency in charge of permitting and regulation of solid waste facilities had given its approval as the proposed facility met all legal requirements and furthered the legislative policy of promoting regional waste disposal alternatives. *See* SDCL 34A-16-49. In addition, the circuit court specifically found that the proposed facility complied with all applicable county regulations and ordinances, and that the opposition voiced by the commissioners was based on their personal desires for an alternative compost facility. When presented with such evidence, it is apparent that approval of the facility was supported by the record, and there was an absence of any competent facts to support County's decision to withhold its approval. Thus, the circuit court correctly concluded that County's refusal to pass a resolution of approval was arbitrary and capricious.

We have concluded that it is unnecessary to reach the constitutional issue raised by Association.

Affirmed.

MILLER, Chief Justice, and SABERS, AMUNDSON, KONENKAMP, and GILBERTSON, Justices, participating.

APPENDIX E

STATE OF SOUTH DAKOTA :
: SS
COUNTY OF BRULE :

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

TRI COUNTY LANDFILL ASSOCIATION, INC.
Plaintiff,
v.
BRULE COUNTY,
Defendant.

Civ. 94-52

ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed March 2, 1995)

The above-entitled matter having come on regularly for hearing before the Hon. Tim D. Tucker at the Brule County Courthouse, Chamberlain, Brule County, South Dakota, on February 1, 2, and 3, 1995; and

The hearing having come on pursuant to the Appeal duly filed herein by Tri County Landfill Association, Inc. (TCLF), (Association), or (Tri County) appealing the Brule County Commissioners' May 3, 1994 decision denying TCLF's request for approval of a sanitary landfill; and

TCLF being represented by Robert R. Schaub of Larson, Sundall, Larson, Schaub & Fox, P.C., Chamberlain; Brule County being represented by Patricia A. Leary Carlson of Pierre, and Douglas M. Deibert of Cadwell, Sanford & Deibert, Sioux Falls; and

That testifying during the hearing for TCLF were Doug Nelson, Larry McManus, Jim Kastner, David Pfahler, Carolyn Trautman, Wilbur Munger, Larry Pechota, Richard Reuer, Bill Kulhavy, Betty Shields, and Edwin Westendorf; that testifying for Brule County were Ronnie Bairey, Raymond Bickner, Roy Rose, Milford Markus, Tim Kenyon, and Derric Iles; and that there were introduced 130 separate evidentiary exhibits by the parties hereto, including the plans, site characterization study and permit application, Brule County Commissioner Minutes, consisting of more than one thousand (1000) pages of technical reports, correspondence, studies, minutes and documents; and

The Court having heard the testimony and considered all evidence and exhibits presented at said hearing, and being fully knowledgeable of the records, files and premises herein, and based upon the entire original record in this matter, and upon good cause, now makes the following:

FINDINGS OF FACT

1. TCLF is an aggrieved person and the Court has jurisdiction of these proceedings pursuant to SDCL ch. 7-8-27 through 7-8-31.

2. New rules and regulations relating to landfills enacted by the state and federal governments substantially changed the way landfills must be operated; this has had a very strong impact on every community, whether it's a county or a city.

3. Tri County, a South Dakota nonprofit corporation, was granted corporate status by the South Dakota

Secretary of State on May 8, 1992, with the stated purpose of developing, constructing and maintaining a regional landfill in an effort to comply with the new state and federal requirements.

4. Brule County became a member by passing a resolution declaring "it is necessary to join together with other jurisdictions to allow for an economical manner in which to handle solid wastes". The resolution further provided "that it is in the best interest of its Citizens to join in a Regional Landfill to be located at the Brule County Landfill Site near Pukwana".

5. TCLF is funded by membership dues that have been periodically paid by its members through the taxation of the members' resident citizens.

6. TCLF's voting delegates are elected officials from the member counties and municipalities. As a member of the Association, Brule County was entitled to and did send delegates, most frequently Commissioner Wilbur Munger, to Association meetings.

7. Notices and minutes of the Association's meetings were mailed to a Brule County Commissioner and to the Brule County Auditor. The Brule County Auditor would personally telephone the Brule County Commissioners after receiving a notice of an Association meeting if it was scheduled to be held before the next Commissioners' meeting. In addition, numerous newspaper articles and notices appeared in the Chamberlain Register concerning the proposed landfill. Furthermore, the Association's Manager Larry McManus, and other Association officials made frequent appearances at Brule County Commissioners meetings for the purpose

of updating the Commissioners on the progress of the landfill permitting process.

8. Tri County's landfill is proposed to be sited on the southwest quarter of the southwest quarter of Section 34, township 104 north, range 70 west, in Brule County, South Dakota. The landfill is sited approximately 800 to 1000 feet south of the existing Brule County landfill, which is operated by the City of Chamberlain. Access to the site is along Interstate 90 and highway 16, to a section line road between Sections 33 and 34.

9. The Tri County site is not located within 1000 feet of an occupied dwelling, interstate, primary highway, or public park or recreation area. The Carroll Priebe residence is the nearest, located 1900 feet from the northeast corner of the site. Mr. Preibe's farmyard contains over 50 disabled cars and trucks. The nearest neighbor to the south is a large feedlot, including a manure lagoon, owned by Lee Schoenhard. The Town of Pukwana is located approximately 2 miles to the northeast. Pukwana's sewage lagoons are located approximately 2.5 miles northeast of the landfill. I-90 is located approximately 3000 feet to the South. I-90 cannot be seen to the south and southeast because of a hill. The elevated I-90 exit ramp to Pukwana can be seen from a portion of the property. Sometime within the anticipated 45 year life of the landfill, it is expected that a portion of the landfill will be visible from the traveled portion of I-90.

10. The proposed site was selected by TCLF for the following reasons:

(a) It was classified as a location for a regional landfill in the 1974 Comprehensive Plan for Brule County,

(b) The Brule County zoning ordinance had a provision for granting of a special use exception for a sanitary landfill,

(c) It was located next to the existing landfill, and

(d) The soil conditions were known to be good for a landfill.

11. On February 9, 1993, the Commissioners approved the sale of the proposed site to the landfill association by passing a resolution providing in part, "Whereas, Federal and State Law has mandated new standards for solid waste disposal; and . . . under such standards, the existing landfill would be inadequate to meet the needs of the residents of Brule County, South Dakota, its municipalities, therein and surrounding environs; and . . . Brule County owns . . . real estate . . . that has been determined to be an acceptable site for solid waste disposal, . . . Therefore . . . the Board of County Commissioners . . . sells forty acres to Tri County Landfill Association, Inc., for the purpose of constructing and operating a landfill . . . . "

12. On March 16, 1993, after being presented with initial plans, Brule County through its zoning board approved the landfill.

13. On April 27, 1993, after publishing two hearing notices on the request for special exception; after a portion of the landfill's plans were published on the front page of the Chamberlain Register's April 1, 1993 edition; and after a public meeting was held April 7, in

which the landfill's design was reviewed with the public; the Brule County Commissioners approved and authorized the landfill to be located in Brule County by granting a special exception under section 5.14.4 of the zoning ordinance for a "sanitary landfill for the proper disposal of refuse . . . " The only restriction under the zoning ordinance was that the sanitary landfill could not be located nearer than 1,000 feet to any residential district or dwelling and it has been established that the proposed landfill will not be within 1,000 feet of any residential district or dwelling.

14. After the special exception was approved, the Chairman of the County Commission completed the transfer of the proposed site by signing the deed and certificate of value to the Association. In addition, the Zoning Administrator, while also in the presence of the Commissioners, signed the Certificate of Zoning compliance and also signed the building permit.

15. The landfill's design was to be that of typical landfills in South Dakota with a portion of the landfill being located in an excavated area and the remainder above ground. After the landfill is completed, in approximately 45 years, the crown will vary between 63 and 77 feet above the existing sloping ground. This will be seeded with grass and other vegetation to give it the appearance of naturally occurring hill.

16. While Brule County did not adopt a resolution which specifically said Brule County adopted a detailed set of plans, through the County's actions and the actions of the county commission clearly approved the landfill facility. There is no reason to give a building

permit to build a landfill facility if the plan is unacceptable.

17. Brule County Commissioners knew TCLF was relying upon Brule county's approval by TCLF spending money and by going forward with the development of the landfill and permit application.

18. On May 6, 1993 TCLF published a notice in the Chamberlain Register of its intent to apply for a permit form [sic] DENR to operate a solid waste disposal facility.

19. On May 20, 1993 TCLF let bids for the daily operation of the proposed landfill facility for a five year period.

20. Within 90 days after issuance of the building permit, TCLF made substantial expenditures by constructing additional monitoring wells, bringing the total wells constructed to 11 a the TCLF site.

21. Completion of the landfill was [sic] been delayed from February 1994 solely to the actions of Brule County in not approving the landfill facility.

22. Tri County engaged the services of Dakota Roadways Consulting, Inc. of Pierre, South Dakota, to aid in permitting and construction of a regional landfill facility. Dakota Roadways Consulting, Inc. was hired in part because it has experience in designing roadbeds and other landfills in South Dakota.

23. The Court finds that solid waste sanitary landfill was located and designed under the direction and supervision of a competent sanitary landfill engineer

and in accordance with modern and commonly accepted methods of solid waste disposal.

24. The Court finds that said solid waste sanitary landfill facility and its operation is essential to the health and comfort of the people in Brule County and the members of Tri County and that the circumstances incident to its operation are not such as to cause said sanitary landfill to be either public or a private nuisance which should be abated, or its use enjoined.

25. Tri County applied to DENR for a solid waste permit on May 27, 1993; and said permit application was in good and proper form.

26. DENR conducted a thorough completeness examination of Tri County's permit application and found the permit application to be in conformity with all South Dakota laws and regulations and that said permit application is procedurally correct.

27. DENR conducted a technical review of said permit application and found the application to be technically sound and in compliance with all South Dakota laws and regulations; and that the permit application addressed each of the matters required under SDCL ch. 34A-6 and ARSD ch. 74:27, and any acts amendatory thereto.

28. DENR recommended the issuance of a permit to construct and operate a municipal solid waste landfill facility under the South Dakota Waste Program, Facility Type II a.

29. Notices were sent out to all the surrounding land owners and notices and newspaper articles were

published in the Chamberlain Register that objections could be filed.

30. No opposition to the landfill was expressed at any Brule County Commissioner's meetings, the public meetings held by the Association, or after the adjoining landowners (which included Brule County) had been notified by certified mail on June 6, 1993, that an application for a solid waste landfill had been filed with the DENR, or at the public meeting held by the DENR at Pukwana on July 15, 1993.

31. DENR published a recommendation of approval of said permit application on July 29,1993, in the Chamberlain Register, a legal publication headquartered in Chamberlain, Brule County, South Dakota. Only after the Secretary of the DENR had issued his tentative approval of the facility and one day before his approval became final, was there an objection filed on August 27, 1993, by one resident of Pukwana. Brule County as a county and as an adjoining land owner, had the right and opportunity to appear as a party at the DENR proceeding. Brule County chose not to appear as a party to the DENR proceeding.

32. DENR sent proper and timely notices of the hearing before the Board of Minerals and Environment.

33. The purpose of the permit proceeding before the BME was to determine whether TCLF's proposed design was a safe and properly designed landfill.

34. There is substantial public support for the granting of Tri County's permit application as evidenced by the verbal support and resolutions of numerous counties and cities; of various state representatives; and

based upon the public comment received at the public hearing conducted by the Department of Pukwana, South Dakota, on July 15, 1993; and further that no citizens testified in opposition to Tri County granted a solid waste permit during the public comment portion of the hearing.

35. Bryan Maas, of Maas & Association, a real estate appraising firm from Sioux Falls, South Dakota, testified on behalf of Tri-County at the DENR hearing that the proposed landfill would not result in lower or reduced property values for surrounding property owners based on his study of property values surrounding the Runge landfill at Sioux Falls, South Dakota, the nearest subtitle D landfill to the proposed Tri-County landfill, and his review of property values around the existing Brule County dump, which said testimony was unrefuted by Contestant, Intervenor, and Brule County at the Appeal Hearing; and the Court finds the location of said landfill will not adversely impact surrounding property values.

36. David Pfahler testified that the ground water to a depth of approximately 50 feet is of poor quality and unfit for human consumption because of the high levels of nitrate and other dissolved solids. Mr. Pfahler also testified that the existing level of the ground water will not be above the located of the liner.

37. Approximately 20 small town unregulated dumps can be closed if the proposed landfill is permitted, thus resulting in substantial benefit to the public and resulting in increased protection for the environment.

38. The proposed facility will not cause significant adverse affect on wildlife, recreation, aesthetic value of the area, or threatened or endangered species; is not located within 1000' of bodies of water classified for fish life propagation; is not located within an area where leachate can potentially contaminate ground water; is not located within the 100 year flood plain; and is not visible or within 1000' of a public park and is in the area that does not constitute a potential safety hazard to the public.

39. Although the objector's attorney had steadfastly argued that the Association had never obtained approval as required by SDCL 34A-6-103, the DENR and Board of Minerals and Environment specifically found that the application for permit was complete. See BME Findings 9 and 27.

40. DENR issued its recommendation on the permit on July 29, 1993, before six months had passed from the date of the county zoning approval. The original hearing date was scheduled for October 20, 1993, also before six months had passed from the date of the county zoning approval. Due to a motion for continuance filed by the contesting parties Lantz and Pay, the hearing was moved beyond six months after issuance of county zoning approval. Because of the objection filed by the Brule County Commissioners, the tolling of the Brule County Commissioners' approval was no longer possible and reapproval became necessary.

41. At the contested hearing before the Board of Minerals and Environment, three Brule County Commissioners, who subsequently voted not to approve the landfill and who are individual Defendants in a separate

civil action, appeared and filed a written objection to the issuance of the permit. The objection did not list any design defects nor did it question whether the Brule County Commissioners' approval had expired.

42. On May 3, 1994, the Association requested reapproval. It was unjustifiably denied. The only question raised by the commissioners was whether out of state garbage would be allowed at the landfill. No discussion was held as to whether the design was unsafe or that it violated or was prohibited under any Brule County ordinance or regulation.

43. Brule County's unreasonable refusal to grant TCLF's request for approval on May 3, 1994 was oppressive because a majority of the commissioners wanted a compost facility, which they admitted, was not allowed under Brule County's zoning ordinances.

44. Tri County's proposed landfill is a regional facility and this Court adopts the legislature's findings contained in SDCL 34A-16-49 as being applicable to the circumstances involving the members to TCLF.

45. Tri County's site is not located in a gravel pit, an unstable area, a seismic impact zone, or a fault area.

46. Roads within the site will be all weather roads. Dust on the roads will be controlled by magnesium chloride or another type of chloride mixture. Speeds on the roads will be limited to control dust. As access to the site is controlled, traffic on these roads is also limited.

47. The landfill will have a perimeter fence enclosing the facility, with controlled access through a locked gate. The maintenance, scale and personnel facilities are

located in the northwest corner. A trash fence will be constructed along the southern border of the facility.

48. Litter controls designed into the facility include the perimeter fence, a trash fence which will be located at the working face, and a fence along the south end of the site, in addition, daily cover will be applied to the waste at the end of each working day. This daily cover controls both litter and disease vectors.

49. A 100 foot buffer zone is designed around the facility.

50. Fire controls for the facility include a fire lane surrounding the area and arrangements with the Chamberlain and Pukwana fire departments. An emergency contingency plan was submitted with the application and includes contact with the Brule County Civil Defense Office.

51. Open burning is not allowed at the facility.

52. Tri County proposes to have equipment on site to control dust and to do their excavation, compaction, and daily cover work. Tri County has made arrangements for backup equipment if any breakdowns occur.

53. The special wastes that will be accepted at the site include: noninfectious medical waste, asbestos, pesticide containers, and ash. Asbestos may not be accepted at the site until an asbestos disposal area is approved by DENR. No other type of waste may be allowed by Tri County unless a change is made in its operation plan.

54. The existing Brule County landfill does not have a liner or barrier underneath the waste. Daily

cover is not applied. Open burning occurs on a daily basis and smoke causes problems for persons living near the landfill. There is a woven wire fence surrounding the facility to control litter. There are no access controls to the site. There are no leachate collection, methane gas, or storm water runoff control systems at the existing Brule County landfill.

55. The witnesses testifying on behalf of Brule County indicated that their objections to the landfill were due to safety, the feasibility of the leachate collection system, the feasibility of the clay liner, its size and final contours, the possibility of ground water contamination, the possibility of out of state garbage be deposited at the site, the lack of local control and that no ground water monitoring plan had been approved by the DENR. The Court finds that these concerns were or could have been voiced at the hearing before the BME and Brule County is bound by the Board's decision, therefore these objections are without merit.

56. Concerning the qualifications of the TCLF manager, while there is evidence of ill will toward Larry McManus, the Court cannot find anything that would question the qualifications of the management.

57. Concerning the handling of the finances of the organization, that too much money was spent on attorney fees and engineer fees, and other items the Court does not find anything in the way of payment of engineering fees, attorney fees, or other expenses that was inappropriate.

58. The location of the landfill was voiced by some of the commissioners however if the county commission objected to the location, they didn't have to sell the land

or grant the Special Exception to TCLF. It would be unjust, and unfair for the county commission to now be able to change their decisions.

59. The size of the pile was voiced by some of the commissioners however the size of the pile was in the first plans that the county commission had back in the spring of 1993.

60. The plans are not hard to read and clearly show the eventual height along with the different phases of construction and the contours of the pile. The Court finds that the size of the pile is not a legitimate reason to now deny approval. The size of the final pile that TCLF requested approval of in May of 1994 is basically the same as the size of the pile that is contained in the plans that were presented to the county commissioners in the spring of 1993.

61. The Court further finds that the Brule County Commissioners willfully and unreasonably disregarded the decision of the BME.

62. For all the reasons set forth in these Findings, the entire record in this matter, all evidence and testimony included therein, the Court finds that the proposed site is suitable for disposal of municipal solid waste, is appropriate for the planned use, and is an environmentally safe site.

63. The Court finds that with regard to all the issues and concerns raised by Brule County herein and its witnesses regarding the proposed facility, in each case those issues and concerns have been answered to the satisfaction of the Court by witnesses on behalf of TCLF, and the entire record, including all exhibits; and

further that all other objections to the granting of approval to the solid waste disposal facility to TCLF are without merit and denied by the Court.

NOW, and from the foregoing FINDINGS OF FACT the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of these proceedings pursuant SDCL 7-8-27 through 31.

2. Appellant, and Brule County have been afforded due process in this hearing.

3. Tri County is a South Dakota nonprofit corporation, is comprised of member governments duly exercising mutual joint powers agreements; Tri County has not violated SDCL 34A-6-1.3, is therefore eligible to receive a solid waste disposal permit and therefore individually grieved by the Brule County Commissioners' denial of approval on May 3, 1994.

4. Tri County's application for a solid waste disposal permit is complete, contains all items required by, and meets the requirements of all applicable laws and regulations, both procedural and substantive, for the issuance of a solid waste disposal permit.

5. The proposed facility complies fully with all applicable requirements of SDCL ch. 34A-6 and ARSD ch. 74:27, inclusive, Brule County's Zoning Ordinances and otherwise fulfills all requirements for the issuance of a solid waste disposal permit.

6. Tri County's proposed facility, if operated in accordance with the submitted application and the permit conditions imposed by the Board, will not cause adverse impacts to the environment or natural resources of South Dakota.

7. Brule County is bound by the Findings of Fact and Conclusions of Law of the Board of Minerals and Environment because they had the right to participate, had the right to appeal the BME's decision, and chose not to participate in any appeal of the BME's decision.

8. Brule County's willful refusal to reapprove TCLF's proposed landfill in light of the BME's decision was unjustifiable.

9. Brule County's unreasonable refusal to grant TCLF's request for approval on May 3, 1994 was oppressive, and arbitrary because a majority of the commissioners wanted a compost facility, which they admitted, was not allowed under Brule County's zoning ordinances.

10. The proposed facility and the granting of approval of the proposed facility by Brule County is in the best interest and general welfare of the public.

11. Tri County's proposed facility, if operated in accordance with Tri-County's representations and the conditions adopted by the DENR, will be environmentally safe.

12. The BME has found that Tri County landfill facility including the leachate collection system, and clay liner to be a safe design and Brule County cannot now recklessly disregard the BME's decision or argue that this landfill facility is an unsafe project because

Brule County has had an opportunity to contest those issues before the BME.

13. As a regional facility, Tri County's proposed facility complies with the statewide Comprehensive Solid Waste Management Plan adopted at ARSD 74:27:18, and is in the public interest.

14. Tri County's proposed site is in compliance with the location standards of ARSD 74:27:11.

15. Tri County's proposed facility, complies with the design, construction, operation and closure/post-closure requirements with ARSD 74:27:12, 74:27:13 and 74:27:15.

16. A number of counties and municipalities relied upon the actions of the Brule County Commissioners in approving the sale of land and grant of special exception to TCLF. Other counties and municipalities have spent money in reliance of Brule County's approvals. For the Brule County Commissioners to stop this landfill facility now without any sound basis is not appropriate and unreasonable.

17. The Brule County Commissioners' refusal to reapprove the TCLF facility on May 3, 1994 was arbitrary, capricious and unreasonable.

WHEREFORE, IT IS HEREBY ORDERED that the permit application submitted by Tri-County Landfill Association, Inc. be approved and Brule County shall grant approval for the proposed TCLF landfill facility in accordance with SDCL 34A-6-103.

Adopted the 1st day of ~~February~~ March, 1995.

/s/ Tim D. Tucker
Hon. Tim D. Tucker
Circuit Court Judge

APPENDIX F

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

TRI COUNTY LANDFILL ASSOCIATION, INC.
Plaintiff and Appellant,
vs.
BRULE COUNTY,
Defendant and Appellee.

ORDER DENYING REHEARING
#22012, #22019
(Filed Apr. 16, 2002)

A petition for rehearing in the above cause having been filed March 26, 2002, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 16th day of April, 2002.

BY THE COURT:
/s/ David Gilbertson
David Gilbertson, Chief Justice

ATTEST:

Shirley Jameson-Fergel
Clerk of the Supreme Court

BY: /s/ Cindy Leichtnam
Chief Deputy Clerk
[SEAL]

APPENDIX G

STATE OF SOUTH DAKOTA	)) : SS	IN CIRCUIT COURT
COUNTY OF BRULE	))	THIRD JUDICIAL CIRCUIT

TRI COUNTY LANDFILL ASSOCIATION, INC., Plaintiff,	)	File # 94-60
-vs-	)	TRANSCRIPT OF MOTIONS HEARING
BRULE COUNTY, Defendant.	)	

Before
The Honorable Jon R. Erickson
Circuit Court Judge

Brule County Courthouse
Chamberlain, South Dakota

April 17, 2001

APPEARANCES:

For the Plaintiff:
Robert R. Schaub
Attorney at Law
PO Box 547
Chamberlain, SD 57325

For the Defendant:
Steven M. Johnson & A. Russell Janklow
Attorneys at Law
431 N Phillips Ave Suite 400
Sioux Falls, SD 57104

and Sheila S. Woodward
Attorney at Law
PO Box 667
Yankton, SD 57078

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Marie H. Fawcett
Official Court Reporter
P.O. Box 1358
Huron, South Dakota 57350

* * *

EXCERPT FROM APRIL 17, 2001 HEARING TRANSCRIPT P. 24.

[24] MS. WOODWARD: As Mr. Schaub indicated, for purposes of our motion for summary judgment, it's important that you take all of the facts in the light most favorable to the landfill association and that the landfill association gets the benefit of all reasonable inferences from those facts. And therefore, for purposes of where we are today, we have to assume that the county commissioners fostered ill will toward Mr. McManus and apparently toward Mr. Schaub as well.

* * *

APPENDIX H

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) :SS
COUNTY OF BRULE) FOURTH JUDICIAL CIRCUIT

Tri County Landfill Association, Inc.,
Plaintiff,
-vs-
Brule County,
Defendant.

Civ. #94-52

* * * * * * * * * * * * * * * * * *

DEPOSITION OF

Milford Markus, Brule County Commissioner

* * * * * * * * * * * * * * * * * *

APPEARANCES:
Mr. Steven A. Fox
Mr. Robert R. Schaub
Larson, Sundall, Larson, Schaub & Fox
Chamberlain, South Dakota

Attorneys for the Plaintiff.

Mr. A. Russell Janklow
Johnson Heidepriem, Miner, Marlow & Janklow
Sioux Falls, South Dakota
-and-

Ms. Sheila S. Woodward
Johnson, Heidepreim [sic], **Miner, Marlow, & Janklow**
Yankton, South Dakota

Attorneys for the Defendant

ALSO PRESENT: Mr. Ronald Bairey

* * *

[5] Q. In effect what happened was Brule County granted them a permit to operate the landfill in 1993. And in 1994 they then denied that same application. Is that correct?

A. I believe so.

Q. Okay. Do you understand the question? Were the same commissioners on the commission in 1993 as in 1994?

A. I believe so.

Q. Wouldn't you agree it's kind of bizarre that those same commissioners approved the permit in 1993 and then denied it a year later? What was your answer?

A. Yes.

* * *